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No. 07-

IN THE

Supreme Court of the United States

SUSAN KNOX, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Petitioner,

v.

THOMAS MINK; THE HOWLING PIG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a prosecutor entitled to absolute immunity from a 42 U.S.C. § 1983 claim based on her review of a search warrant for sufficiency of probable cause pursuant to a specific state statute requiring her to do so before the search warrant's presentation to a judge by the police?

LIST OF PARTIES TO THE PROCEEDING

1. Susan Knox, petitioner

2. Thomas Mink, respondent

3. The Howling Pig, respondent

John W. Suthers and Kenneth R. Buck , defendants below, have no interest in this proceeding. The other entities in the caption at the Tenth Circuit were amici.

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OPINIONS BELOW

The decision of the United States Court of Appeals has been published at 482 F.2d 1244. App. 1a. The decision of the United States District Court for the District of Colorado has been published at 344 F. Supp.2d 1231. App. 39a.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on April 16, 2007. App. 1a. Respondents Thomas Mink and *The Howling Pig* filed a Motion for Extension of Time to File Petition for Rehearing on April 26, 2007, which was granted by the Tenth Circuit on April 27, 2007. On May 13, 2007, Respondents filed a Petition for Panel Rehearing or Rehearing En Banc. The United States Court of Appeals denied the Petition for Panel Rehearing or Rehearing En Banc in an Order dated July 19, 2007. App. 59a. The Court has jurisdiction to entertain this petition for certiorari pursuant to the provisions of 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves 42 U.S.C. § 1983:

Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This case also involves Colorado's criminal libel statute, C.R.S. § 18-13-105:

Criminal libel

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.

(2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.

(3) Criminal libel is a class 6 felony.

This case also involves a Colorado statute regarding review by a district attorney of search warrant affidavits, C.R.S. § 20-1-106.1:

Preparation and review of affidavits and warrants

(1) The district attorneys of the several judicial districts in the state of Colorado shall:

(a) Render, in their quasi-judicial capacity, legal advice to peace officers, upon the request of such officers or of the court, pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures, nontestimonial identification items, and court orders for the production of records;

(b) Examine and evaluate each affidavit for a no-knock search warrant sought pursuant to part 3 of article 3 of title 16, C.R.S., and render legal advice regarding such affidavit to the peace officer submitting the affidavit before such affidavit is submitted to a judge. A district attorney, including any assistant

district attorney, chief deputy district attorney, or deputy district attorney, shall indicate approval of an affidavit by placing the date and his or her signature and attorney registration number on the affidavit as allowed by statute or court rule. A district attorney shall only sign an affidavit for a no-knock search warrant sought pursuant to part 3 of article 3 of title 16, C.R.S. upon satisfaction that the information in such affidavit;

(I) Fulfills the requirements of section 16-3-303, C.R.S.; and

(II) Supports the lawful issuance of a search warrant pursuant to section 16-3-301, C.R.S.

(2) In the absence of the bad faith performance of the duties specific in this section, the district attorneys of the state of Colorado shall be immune from liability for the performance of said duties; except that such immunity shall not apply to charges of perjury in the first degree, perjury in the second degree, or false swearing brought pursuant to section 18-8-502, 18-8-503, or 18-8-504, C.R.S., respectively.

(3) The division of criminal justice within the Colorado department of public safety shall review existing policies relating to the issuance and use of no-knock search warrants pursuant to section 24-33.5-503(1)(q), C.R.S.

STATEMENT OF THE CASE

Thomas Mink was a student at the University of Northern Colorado ("UNC"). Mr. Mink published an internet-based journal called *The Howling Pig*. Several issues of *The Howling Pig* included Mr. Mink's column under the pen name "Jun' ıs Puke," which parodied the views of an actual UNC professor named Junius Peake. Professor Peake complained to the Greeley Police Department who initiated an investigation of Mr. Mink for potential violations of Colorado's criminal libel statute, C.R.S. § 18-13-105.

The Greeley Police Department sought a search warrant to search Mr. Mink's home. Pursuant to the procedures of Colorado law, a police detective prepared a search warrant affidavit and submitted the affidavit to the office of the district attorney for legal review pursuant to C.R.S. § 20-1-106.1. Chief Deputy District Attorney Susan Knox reviewed and approved the search warrant affidavit for its sufficiency for probable cause. The search warrant affidavit was then presented to and approved by a Colorado magistrate judge. With the search warrant in hand, the Greeley Police Department searched Mr. Mink's home on December 12, 2003. The police confiscated various computer and other materials related to *The Howling Pig*. Ultimately, the District Attorney determined not to prosecute Mr. Mink for criminal libel.

Mr. Mink filed this lawsuit on January 8, 2004, alleging Ms. Knox violated his constitutional rights pursuant to 42 U.S.C. § 1983, as well as his statutory rights under the Privacy Protection Act, 42 U.S.C.

§ 2000aa, and the Electronic Communications Privacy Act, 18 U.S.C. § 2703. The operative complaint in this matter is Mr. Mink's First Amended and Supplemented Complaint dated February 19, 2004. App. 7a. Ms. Knox filed a Motion to Dismiss or in the Alternative for Summary Judgment on April 9, 2004. On October 26, 2004, United States Chief District Judge Lewis T. Babcock issued his Memorandum Order and Opinion granting Ms. Knox's Motion to Dismiss. App. 39a. The District Court concluded Mr. Mink failed to state any cognizable Privacy Protection Act or Electronic Communications Act claim. App. 46a & App. 57a. The District Court also held Ms. Knox was entitled to absolute immunity from Mr. Mink's 42 U.S.C. § 1983 Fourth Amendment claim because she acted in a quasi-judicial capacity when she reviewed and approved the search warrant affidavit for the Greeley Police Department. App. 51a. In pertinent part, the District Court reasoned:

> Ms. Knox's review of the warrant affidavit was a proximate (and commendable) precursor to the presentation of the affidavit before the magistrate, an undisputedly quasi-judicial activity. Had Ms. Knox herself presented the warrant affidavit to the magistrate after reviewing and approving it, all of her actions undoubtedly would have fallen within the immunity in ***Burns*** and ***Roberts***. I cannot see how her delegation of the latter task to a police officer affects her immunity for the former. It is not too much to presume that the police brought the affidavit to Ms. Knox for approval in her capacity as an "officer of the court." ***Pfeiffer***, 929 F.2d at 1490.

The rationale underlying absolute prosecutorial immunity counsels in favor of recognizing it in this case. The ***Imbler*** Court explained that the immunity of a prosecutor is based upon the same considerations that underlie the common-law judicial immunities that judges and grand jurors enjoy. ***Imbler***, 424 U.S. at 422-423. Subjecting prosecutors to liability for prosecuting unsuccessful cases would, the Court reasoned, undermine performance of the prosecutor's duties; the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." ***Imbler***, 424 U.S. 424-425. "Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." ***Imbler***, 424 U.S. at 425.

Police ought to be encouraged to bring warrant affidavits to prosecutors before entreating magistrates. Such a practice promotes reliability and judicial economy. Prosecutors are expected to be as knowledgeable as judges concerning the legal requirements of probable cause and are qualified to make the fundamentally judicial determination that an affidavit does or does not meet the legal standard. Prosecutors in such circumstances must, if the practice is to

produce just results, be immunized from suit for their decisions as are judges. And prosecutors ought not be discouraged from performing such reviews by the prospect of suit.

An additional consideration for the *Imbler* Court was the heightened difficulty an honest prosecutor would face in asserting a qualified immunity defense because in a vacuum, many decisions that a prosecutor makes can be perceived as constitutional deprivations. *Imbler*, 424 U.S. at 425-426. Qualifying a prosecutor's immunity "would prevent the vigorous and fearless performance of the prosecutor's duty to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-428. Of course, when viewed in context, a prosecutor's advocacy for the state is often counterbalanced by the advocacy of the defense. If a prosecutor presents a witness of dubious credibility, for example, the defense is free to impeach that witness through cross-examination. That countervailing force is absent in this case. However, many adversarial acts of prosecutors—such as presenting evidence for search warrant applications, appearing before grand juries, and swearing out criminal complaints—meet no resistance from defense attorneys, but warrant absolute immunity nonetheless because they are essential to the efficient functioning of the criminal justice system.

> Ms. Knox cites to Colorado Revised Statutes Section 20-1-106.1 ("Immunity Act") as a basis of absolute immunity. As state law, the Immunity Act cannot immunize Ms. Knox from a 42 U.S.C. § 1983 claim. *See* ***Howlett v. Rose***, 496 U.S. 356, 376, 110 S. Ct. 2430, 110 L.Ed. 2d 332 (1990). However, in the absence of clear Federal law on the question, the Immunity Act provides a persuasive understanding of what constitutes a quasi-judicial act. It provides that, in the absence of bad faith, prosecutors "shall be immune from liability for the performance of" various "quasi-judicial" duties, including examination and evaluation of an affidavit for a search warrant "before such affidavit is submitted to a judge." Colo. Rev. Stat. § 20-1-106.1 (1 and 2). This rule is consistent with the ends outlined in ***Imbler.***
>
> Ms. Knox is absolutely immune from liability on the Third Claim.

App. 49a-51a. Judgment was entered by the District Court on October 27, 2004.

On November 24, 2004, Mr. Mink filed his Notice of Appeal to appeal the District Court's grant of the motions to dismiss in favor of all of the Defendants, including Ms. Knox. The United States Court of Appeals for the Tenth Circuit, in an Opinion dated April 16, 2007, reversed the District Court's grant of absolute immunity to Ms. Knox on Mr. Mink's 42 U.S.C. § 1983 Fourth Amendment claim. App. 1a.

REASONS FOR GRANTING THE PETITION

I. The United States Court Of Appeals For The Tenth Circuit's Decision Fails To Follow Decisions From The Court

The Court of Appeals' decision fails to follow decisions from the Court in two respects. First, the Court of Appeals' analytical approach is not faithful to this Court's functional approach for making absolute immunity decisions. The Court of Appeals, rather than analyzing the function of Ms. Knox's review and approval of the search warrant affidavit in the context of the applicable Colorado statute and the practice of the judicial district where she worked, instead narrowly focused on whether Ms. Knox's activities could be characterized as advocacy. The Court of Appeals' failure to follow a functional analysis and to analyze the purpose of Ms. Knox's activities against the background of the real world is inconsistent with this Court's prior approach. Second, the Court of Appeals' decision failed to evaluate Ms. Knox's actions based on the undisputed fact that her only action with respect to the search warrant affidavit was to conduct a review of it for its legal sufficiency from a Fourth Amendment probable cause perspective pursuant to Colorado law. The failure by the Court of Appeals to understand the importance of why Ms. Knox conducted the legal sufficiency review she did is also inconsistent with this Court's approach.

A. The Court of Appeals Decision Conflicts With Precedent From the Court in Concluding Chief Deputy District Attorney Knox's Review and Approval of the Search Warrant for its Probable Cause Sufficiency Was Not Undertaken in her Advocacy Role as an Officer of the Court

The Court of Appeals incorrectly determined Ms. Knox was not entitled to absolute immunity for her action of reviewing the sufficiency of the arrest warrant presented to her by the police for her review pursuant to Colorado law. Both the Court of Appeals' analysis and its holding are in conflict with prior decisions of this Court providing absolute immunity to prosecutors in their advocacy role and as officers of the court.

The starting place for any analysis of Ms. Knox's entitlement to absolute immunity should be this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976). There, this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. In *Imbler*, this Court at least hinted that a "functional approach" should be used in evaluating the activities of a prosecutor to determine whether absolute immunity applied. *Id.* at 430-431. Following *Imbler*, this Court has unambiguously adopted a functional approach to addressing absolute immunity issues. *See, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993); *Forrester v. White*, 484 U.S. 219, 223-24 (1988); *Cleavinger v. Saxner*, 474 U.S. 193, 201-202 (1985).

The Court next addressed absolute immunity for prosecutors in *Burns v. Reed*, 500 U.S. 478 (1991). In

Burns, this Court addressed whether a state prosecuting attorney was absolutely immune from liability for damages in a 42 U.S.C. § 1983 case *inter alia* for participating in a probable cause hearing before a county court judge seeking to obtain a search warrant to search a criminal suspect's house and car. *Id.* at 481-482. The Court concluded the prosecutor's participation in the probable cause hearing where he examined a witness and successfully obtained a search warrant from the county court warranted absolute immunity. *Id.* at 487-492. In so doing, this Court noted that "the issuance of a search warrant is unquestionably a judicial act." *Id.* at 492 (citing *Stump v. Sparkman*, 435 U.S. 349, 363 n. 12 (1978)). Further, this Court also observed that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution." *Id.* at 492 (quoting *Imbler*, 424 U.S. at 431 n. 33). However, with respect to the search warrant, this Court carefully examined what was at issue and noted "[a]n examination of petitioner's complaint, the decisions by both the District Court and the Seventh Circuit, and the questions presented in the petition for a writ of certiorari in this Court reveals that petitioner has challenged only respondent's participation in the hearing, and not his motivation in seeking the search warrant *or his conduct outside of the courtroom related to the warrant*." *Id.* at 487 (emphasis and alteration added).[1] Thus, the issue presented in this case was expressly left open in *Burns*.

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1. Indeed, the scope of what was at issue with the petitioner's claims in *Burns* was in dispute between this Court and the dissent. *Compare Burns*, 500 U.S. at 487-489 & n. 5 *with Burns*, 500 U.S. at 496-505 (Scalia, J. dissenting).

Following *Burns*, this Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), reaffirmed the principle that a prosecutor may be entitled to absolute immunity for activities preliminary to the actual initiation of a prosecution. In *Buckley*, this Court concluded:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Buckley, 509 U.S. at 273. Ultimately, in *Buckley*, the Court determined the prosecutors were not entitled to absolute immunity because their activities at issue in that case were investigatory in nature and did not relate to their professional role as advocates and officers of the court. *Buckley*, 509 U.S. at 274.

In *Kalina v. Fletcher*, 522 U.S. 118 (1997), whether a prosecutor was entitled to absolute immunity was again presented to this Court. In *Kalina*, the state prosecutor commenced a criminal proceeding by filing three documents with the state district court—an information, a motion for an arrest warrant, and Certification for Determination of Probable Cause. At issue in *Kalina*

was the prosecutor's completion of the Certification of Probable Cause because it included a sworn statement by the prosecutor herself vouching for the truth of the facts set forth in the certification as supporting probable cause. *Kalina*, 522 U.S. at 120-121. This Court concluded that the prosecutor's execution of the certification under penalty of perjury made her a complaining witness and not an advocate and therefore she was not entitled to absolute immunity. *Kalina*, 522 U.S. at 129-131. However, in reaching this conclusion, this Court's analysis in *Kalina* addressed a variety of issues of critical importance to any determination of Ms. Knox's absolute immunity in this case that were ignored by the Court of Appeals below.

Initially, the Court in *Kalina* made clear that the prosecutor's activities in evaluating the evidence to determine whether sufficient probable cause existed and even drafting the Certification of Probable Cause were conducted in her role as an advocate. *See Kalina*, 522 U.S. at 129 ("Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate's function as well."); *Kalina*, 522 U.S. at 130 ("indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of an advocate."). Review of *Kalina* unequivocally demonstrates it was the prosecutor's taking on the role of a witness by swearing to the facts contained in the Certification for Probable

Cause that rendered her actions not within the scope of her advocacy role as an officer of the court.

> Testifying about facts is the function of a witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.

Kalina, 522 U.S. at 130-131.

Further, the Court in *Kalina* evaluated the prosecutor's absolute immunity in that case in the context of the legal requirements and practice of the prosecutors in her jurisdiction, as follows:

> Although the law required that document to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed. Even if she may have been following a practice that was routinely employed by her colleagues and predecessors in King County, Washington, that practice is surely not prevalent in other parts of the country and is not even mandated by law in King County. Neither petitioner nor *amici* argue that prosecutors routinely follow the King

> County practice. Indeed, tradition, as well as the ethics of our profession, generally instruct counsel to avoid the risks associated with participating as both advocate and witness in the same proceeding.

Kalina, 522 U.S. at 129-130.

The Court of Appeals acknowledged this Court's cases cited above, but concluded that Ms. Knox's role in reviewing the search warrant affidavit and evaluating its probable cause sufficiency pursuant to her specific obligation under Colorado law did not involve advocacy, but instead "her function was to provide legal advice outside the courtroom to aid a nascent investigation." App. 36a. This analysis and conclusion by the Court of Appeals is fundamentally at odds with this Court's absolute immunity precedent.

First, the Court of Appeals, while paying lip service to this Court's functional approach to absolute immunity questions, actually analyzed Ms. Knox's entitlement to absolute immunity by determining whether her state-law mandated review of the search warrant affidavit constituted "advocacy" or "investigation." App. 34a-37a. The Court of Appeals' binary approach is inconsistent with this Court's long-standing functional approach. Fundamentally, the problem with the Court of Appeals' approach in this case is that Ms. Knox's review of the search warrant is not easily categorized as either "advocacy" or "investigation." The Court of Appeals' categorical approach drove its conclusion that Ms. Knox was not acting as an advocate in reviewing the search warrant affidavit so she must have been acting in an

investigatory capacity. The failure by the Court of Appeals to employ the type of nuanced functional approach adopted by this Court led the Court of Appeals astray in both its analysis and its conclusion. The proper approach to evaluating Ms. Knox's entitlement to absolute immunity in reviewing the search warrant affidavit is to focus on how her actions relate to the judicial process and whether her actions were uniquely delegated to prosecutors under Colorado law. *See, e.g.*, *Burns*, 500 U.S. at 495 ("Rather, as in *Imbler*, we inquire whether the prosecutor's actions are closely associated with the judicial process."); *Burns*, 500 U.S. at 494 ("Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct."; emphasis in original).

Applying a functional approach to Ms. Knox's action in reviewing the search warrant affidavit in this case pursuant to Colorado law prior to its submission to the magistrate judge demonstrates its close association with the judicial process. As the District Court recognized, "Ms. Knox's review of the warrant affidavit was a proximate (and commendable) precursor to the presentation of the affidavit before the magistrate, an undisputably quasi-judicial activity." App. 49a. Ms. Knox reviewed the search warrant affidavit not as part of any investigation in conjunction with the police, but instead as part of her role as a deputy district attorney to determine whether the facts presented in the search warrant affidavit met the Fourth Amendment probable

cause legal standard. Nothing about what Ms. Knox did was to assist the police in any investigatory activity. Instead, she provided a prior legal review of the search warrant affidavit in her role as a prosecutor and an officer of the court. No allegations have been raised that Ms. Knox had any involvement whatsoever in the gathering of evidence by the police or that she provided any legal advice to the police about their investigatory activities. "Nothing in the Amended Complaint indicates Ms. Knox discussed with police the advisability of searching the Mink residence or that she assisted the police in drafting the warrant in such a way as to increase the likelihood that the magistrate would find probable cause. Instead, the Plaintiffs allege only that Ms. Knox 'reviewed and approved the affidavit submitted to the state district court in support of the warrant to search the Minks' home.' Amended Complaint, 16." App. 47a-48a. As this excerpt from the District Court's opinion makes clear, in a fashion never rebutted by the Court of Appeals, Ms. Knox was not attempting to guide the police. Instead, she reviewed the search warrant affidavit to assist the court by screening it prior to its submission by the police. Again, the District Court's analysis of both the nature of Ms. Knox's role and the inherent utility of this type of pre-court review is worth quoting in full in this context:

> Police ought to be encouraged to bring warrant affidavits to prosecutors before entreating magistrates. Such a practice promotes reliability and judicial economy. Prosecutors are expected to be as knowledgeable as judges concerning the legal requirements of probable cause and are

> qualified to make the fundamentally judicial determination that an affidavit does or does not meet the legal standard. Prosecutors in such circumstances must, if the practice is to produce just results, be immunized from suit for their decisions as are judges. And prosecutors ought not be discouraged from performing such reviews by the prospect of suit.

App. 50a. The District Court's approach, not that of the Court of Appeals, appropriately analyzes the absolute immunity issue under the functional approach mandated by this Court.

Further, the Court of Appeals' analysis fails to account for the nature of Ms. Knox's review of the search warrant affidavit in terms of its sufficiency for meeting the legal standard for probable cause. Ms. Knox did not review the search warrant affidavit to determine its sufficiency in terms of its evidence or to evaluate the investigatory efforts of the police. Instead, and in sharp contrast, Ms. Knox reviewed the search warrant affidavit to determine if it met the legal requirements for probable cause. This type of exercise of the professional judgment of a prosecutor, as the District Court recognized, is all together different and demonstrates a close association with the judicial process itself. *See, e.g., Kalina*, 522 U.S. at 130 (noting that the prosecutor's "determination that the evidence was sufficiently strong to justify a probable-cause finding" was the work of an advocate).

Second, the Court of Appeals ignored how this Court's analysis in *Kalina* is germane to evaluating Ms.

Knox's actions as a function of Colorado law. It is undisputed that Ms. Knox reviewed the search warrant affidavit presented to her by the police because of the requirements of Colorado law found at C.R.S. § 20-1-106.1. Based on this statute, Ms. Knox was required as part of her official duties and responsibilities as a district attorney, to review any search warrant affidavits presented to her by law enforcement to determine whether they met the legal requirements of probable cause. It is significant that Ms. Knox's activities were pursuant to this specific Colorado statute. In *Kalina*, as quoted above, this Court specifically noted that the prosecutor's swearing of the facts in the Certification for Probable Cause was not required by any state or federal statute. *Kalina*, 522 U.S. at 129-130. This Court's reference to a potential statutory requirement demonstrates that the existence of the type of specific statutory requirement as C.R.S. § 20-1-106.1 presents a different circumstance than *Kalina*. Indeed, at least by implication, this Court's analysis in *Kalina* strongly suggests had the prosecutor in that case sworn the Certification for Probable Cause pursuant to a specific Washington statute she would have been entitled to absolute immunity. The Court of Appeals never considered this aspect of either *Kalina* or how Ms. Knox's activities pursuant to this Colorado statute differentiated this situation and made it subject to absolute immunity.

Instead, the Court of Appeals discounted the import of C.R.S. § 20-1-106.1 by suggesting that state law cannot create immunity for a federal 42 U.S.C. § 1983 claim. App. 37a. The Court of Appeals' analysis is perfunctory. Ms. Knox relies on C.R.S. § 20-1-106.1 to provide the

context for her actions and to demonstrate that under *Kalina* her actions in reviewing the search warrant affidavit pursuant to a specific requirement of Colorado law is qualitatively different than simply doing so at the instigation of the police. Indeed, as stated in Ms. Knox's affidavit filed with the District Court in support of her motion, Ms. Knox related she reviewed the search warrant affidavit in this case pursuant to the practice of the county and district judges in the judicial district who requested review of search warrant affidavits by the district attorney's office prior to their submission to a judge. Ms. Knox's actions pursuant to Colorado law and the explicit court-mandated practice of her judicial district makes this situation the equivalent of what this Court explained would be different in *Kalina*. The Court of Appeals' failure to analyze Ms. Knox's absolute immunity in these terms is inconsistent with *Kalina*.[2]

Under this Court's functional approach, in determining whether a prosecutor's actions are subject to absolute immunity, a court should ask whether the action is one that is normally undertaken by a prosecutor or by a police officer. Here, there can be no question,

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2. Moreover, at least three prior members of this Court previously raised an analogous issue. *See Johnson v. Rex*, 474 U.S. 967, 967 (1985) (Burger, C.J., joined by Rehnquist and O'Connor, J.J., dissenting from denial of certiorari)

> Here the prosecutor was acting as an officer of the court in ensuring compliance with the *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] requirements, and I would grant the petition for certiorari in order to define the applicability of absolute immunity in this context; surely the prosecutor's action was well within his function as a prosecutor and officer of the court.

particularly in light of C.R.S. § 20-1-106.1 and the explicit practice of the applicable judicial district, that the act of reviewing a search warrant affidavit for its legal sufficiency for probable cause prior to its submission to a judge is a uniquely prosecutorial role, and not one that is either normally performed, or even could be performed, by a police officer. Ms. Knox is therefore entitled to absolute immunity from any claim arising from her action in reviewing the search warrant, and the Court of Appeals' determination to the contrary is incorrect and must be reviewed by this Court.

II. The Proceeding Involves A Question Of Exceptional Importance, In That The Result, If Undisturbed, Will Lead To Significant Disruption For Prosecutors Throughout The United States For Defending Claims Pursuant To 42 U.S.C. § 1983 Because The Tenth Circuit's Decision Represents A Significant Erosion In The Protections Afforded By Absolute Immunity

As the Court has repeatedly and consistently recognized, important public policy reasons exist for affording prosecutors absolute immunity from subsequent civil suits related to their activities as a prosecutor. "These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. Indeed, the Court has also recognized that the unique role of the prosecutor means that affording prosecutors only qualified immunity would be an inadequate protection for them from the threat and distraction inherent in

litigation challenging their prior prosecutorial decisions. *Imbler*, 424 U.S. at 425.

The policy concerns animating this Court's absolute immunity jurisprudence apply with equal force under these circumstances. Ms. Knox reviewed the search warrant affidavit pursuant to Colorado law and the explicit practice of the judges in the judicial district where she worked. The clear rationale behind both these statutory and judicial requirements were to have prosecutors review the search warrant affidavits as officers of the court to assist the court in its efforts to review warrant applications under the Fourth Amendment. Thus, the operations of the judiciary are unmistakably implicated by the process followed by Ms. Knox in this case. If absolute immunity is not afforded to Ms. Knox, prosecutors may not be willing to engage in this type of review and the judicial system will unnecessarily suffer as a result. As the District Court recognized in this case, the salutary purpose of the statutory review by prosecutors would be undermined by a conclusion that absolute immunity does not attach to this type of review of a search warrant affidavit by a prosecutor. Overall, the public policy benefit of having prosecutors review search warrant affidavits for their legal sufficiency under the Fourth Amendment outweighs the competing concerns of allowing disaffected persons who are the subject of such search warrants to sue the prosecutor. As the Court has recognized in this context, a variety of different other avenues exist for a disaffected person to seek relief from inappropriate prosecutorial actions. Here, the balance must be struck in favor of affording Ms. Knox absolute immunity from the Plaintiffs' 42 U.S.C. § 1983 claims for her action in reviewing the search warrant presented to her by the police pursuant to Colorado law

and the policy of the judicial district where she worked as a prosecutor. The Court should take this case to provide it with an opportunity to reaffirm the important absolute immunity principles present here.

CONCLUSION

In conclusion, for all of the foregoing reasons, Petitioner Susan Knox, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity, respectfully requests this Court grant her Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED APRIL 16, 2007

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 04-1496

THOMAS MINK; THE HOWLING PIG,
an unincorporated association,

Plaintiffs-Appellants,

v.

JOHN W. SUTHERS, in his official capacity as Attorney General of the State of Colorado, KENNETH R. BUCK, District Attorney for Colorado's 19th Judicial District; SUSAN KNOX, a Chief Deputy District Attorney working for Colorado's 19th Judicial District Attorney's Office, in her individual capacity,

Defendants-Appellees,

and

STUDENT PRESS LAW CENTER; SILHA CENTER FOR THE STUDY OF MEDIA ETHICS; WORLD PRESS FREEDOM COMMITTEE; ASSOCIATED PRESS; BLOOMBERG NEWS; COLORADO PRESS ASSOCIATION; DOW JONES & COMPANY, INC.; MEDIA LAW RESOURCE CENTER; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; COLORADO DISTRICT ATTORNEYS' COUNCIL,

Amicus Curiae.

Appendix A

April 16, 2007

Before O'BRIEN, EBEL, and TYMKOVICH, Circuit Judges.

TYMKOVICH, Circuit Judge.

I. Introduction

Colorado law makes it "criminal libel" to knowingly publish any statement tending to "impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule." Colo.Rev.Stat. § 18-13-105. While a student at the University of Northern Colorado (UNC), Thomas Mink created and published an internet-based journal called *The Howling Pig*. Several issues of the journal included Mink's pseudonymous column by "Junius Puke," which parodied the views of a real UNC professor named Junius Peake, and whose on-line photograph bore a strong resemblance to the real professor.

Professor Peake complained to the Greeley Police Department who commenced an investigation of Mink for potential violations of Colorado's criminal libel statute. The police, in conjunction with the local district attorney's office, sought and obtained a search warrant, which they executed at Mink's residence, seizing his personal computer and other written materials.

Mink sued for prospective relief and damages under 42 U.S.C. § 1983, and for violations of the Privacy Protection Act, 42 U.S.C. § 2000aa. The district court entered a temporary restraining order against the district attorney's office, but dismissed the case in its entirety after the office disavowed an intent to prosecute Mink. The district court concluded that: (1) Mink's request for declaratory judgment failed for lack of standing, (2) the statutory privacy claim failed to state a claim for relief, and (3) the damages claim against the assistant district attorney arising from the search was barred by absolute prosecutorial immunity.

Having jurisdiction pursuant to 28 U.S.C. § 1291, we affirm both the dismissal of Mink's facial challenge to the Colorado criminal libel statute because he lacks standing and his claim is moot, and the dismissal of his statutory damages claim for failure to state a claim. But we reverse the district court's dismissal of the damages claim arising from the search because we conclude it is not barred by absolute immunity. Accordingly, we remand to the district court for further proceedings on the question of qualified immunity.

II. Background

Thomas Mink began releasing issues of *The Howling Pig*, a student-run, internet-based journal, during his fall 2003 semester as a student at the University of Northern Colorado. The journal, which was created, maintained, and published from the home computer Mink shared with his mother, addressed current events

involving the local UNC community. Among other things, it featured a regular column from the editor, a fictional character named "Junius Puke." The column displayed obviously doctored photographs of an actual UNC professor, Junius Peak, wearing dark sunglasses and a Hitler-like mustache. The purpose of the column, according to Mink, was to "spoof[ ] and parod[y] Professor Peake by addressing subjects on which the real professor would be unlikely to write, or through the assertion of views diametrically opposed to those of Professor Peake." Aplt.App. at 80-81.

After learning of the parody, Professor Peake contacted the local district attorney and swore out a complaint, alleging he was a victim of criminal libel. Colo.Rev.Stat. § 18-13-105. In response to the complaint, a Greeley Police Department detective opened an investigation. The detective reviewed copies of *The Howling Pig* and concluded that its editor was Mink. Based on this information, the detective prepared a search warrant affidavit according to procedures required by Colorado law. Colo.Rev.Stat. § 16-3-301; Colo. R.Crim. Proc. 41(b), (c). These procedures allow a detective to submit an affidavit to the office of the district attorney for legal review. Colo.Rev.Stat. § 20-1-106.1. Consequently, a deputy district attorney, appellee Susan Knox, reviewed and approved the search warrant affidavit, which was then presented to and approved by a magistrate judge.

With the search warrant in hand, Greeley police searched the home where Mink lived with his mother on

December 12, 2003. The police confiscated Mink's personal computer and additional written materials referencing *The Howling Pig*. According to Mink, during the search one of the detectives told him he was in "big trouble" and led him to believe a criminal complaint had been filed. Mink also claims that a detective warned him that resuming publication of *The Howling Pig* would only "make things worse for [him]." Aplt.App. at 82-83.

Following the search, Mink obtained counsel who contacted the Greeley police on December 23, 2003. According to Mink's counsel, the investigating officer disclosed his plans to recommend that criminal libel charges be filed against Mink. That same day, Mink's counsel informed a lawyer in the district attorney's office that he believed the criminal libel law could not be applied constitutionally against Mink for statements made in *The Howling Pig*. On December 30, 2003, Mink's counsel faxed a letter to the district attorney demanding the immediate return of materials seized from Mink's home and explaining Mink's position that prosecuting him under the criminal libel statute would be unconstitutional. The letter requested a reply by January 2, 2004, but the district attorney apparently never responded.

On January 8, 2004, Mink filed suit in federal district court seeking prospective declaratory relief that the Colorado criminal libel statute was unconstitutional under the First Amendment and also requesting damages for the search and seizure conducted pursuant to the statute. With respect to the first claim, the

complaint alleged Mink faced "an imminent threat of being charged with a violation of Colorado's Criminal Libel Statute," Aplt.App. at 10, and that the "criminal investigation, the threatened prosecution, and the search and seizure have chilled Mr. Mink from exercising his right to freedom of expression and his right to freedom of speech." Aplt.App. at 15.

Mink also requested a temporary restraining order. On January 9, 2004, the district court ordered:

> that the District Attorney for the 19th Judicial District shall not initiate the prosecution of Thomas Mink under Colorado's Criminal Libel Statute, C.R.S. § 18-13-105, and the City of Greeley shall, forthwith, return to the Plaintiffs the computer, and all contents thereof, seized following the search of Plaintiffs' home in Ault, Colorado.

Dist. Ct. Order, Jan. 9, 2004, at 1.

The district court subsequently held a status conference during which it learned the district attorney would not be filing charges against Mink. In addition, the district attorney issued a written "No File" decision, concluding the statements contained in *The Howling Pig* could not be prosecuted under the statute. Thereafter, pursuant to an agreement of the parties, the court issued an order vacating its temporary restraining order.

Mink filed an amended complaint on February 19, 2004 on behalf of himself and *The Howling Pig*. The amended complaint repeated his allegations that the Colorado criminal libel statute was unconstitutional, and also named the Colorado Attorney General and the local district attorney as defendants in their official capacities for purposes of seeking prospective relief. Mink also realleged violations of his statutory and constitutional rights based on the search of his residence. He further claimed he had published two new issues of *The Howling Pig* since the filing of the complaint which contained statements that might be construed as violations of Colorado's criminal libel statute, and said he planned to continue publishing such statements in the future. In addition, he named Susan Knox, the deputy district attorney who reviewed and approved the search warrant affidavit, in her individual capacity under 42 U.S.C. § 1983 and the Privacy Protection Act, 42 U.S.C. § 2000aa.[1]

The district attorney answered the amended complaint on April 9, 2004, admitting most of its allegations. After the defendants filed dispositive motions, the district court dismissed Mink's suit in its entirety because (1) he lacked standing to challenge the constitutionality of the criminal libel statute, (2) he failed to properly state a statutory claim for relief under the Privacy Protection Act, and (3) his constitutional claims against the deputy district attorney were barred by absolute immunity.

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1. By this time, Mink had dropped his claims against the Greeley police department and the individual detective named in the original complaint.

Appendix A

III. Discussion

This appeal raises three issues: first, whether we have jurisdiction to consider Mink's facial constitutional challenge to the criminal libel statute in light of the district attorney's disavowal of an intent to prosecute; second, whether Mink's claim for damages under the federal Privacy Protection Act states a cause of action against public officials who did not participate in the search of Mink's residence; and third, whether Mink's claims for damages against the attorney who reviewed the search warrant are barred by the doctrine of absolute prosecutorial immunity.

We accept all well-pleaded facts as true for purposes of resolving an appeal from a motion to dismiss.[2] *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir.2002), *cert. denied*, 538 U.S. 999, 123 S.Ct. 1908, 155 L.Ed.2d 826 (2003). We view the facts as alleged in the complaint in the light most favorable to the plaintiffs, and we will uphold the dismissal only if it appears beyond doubt that they can prove no set of facts which would entitle them to relief. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088-89 (10th Cir.2006).

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2. Mink also appeals the district court's denial of his motion for partial summary judgment. Because we affirm the dismissal of his claim for declaratory relief, we do not reach this issue.

Appendix A

A. Facial Challenge to Colorado's Criminal Libel Statute

1. Summary of Constitutional Claims

Before turning to the threshold jurisdictional issues, we provide a brief summary of Mink's constitutional argument. This background bears on both the underlying procedural posture of the case, as well as the claims asserted against the prosecutor who reviewed the affidavit in support of the search warrant.

Mink requests a declaration that the Colorado criminal libel statute is facially unconstitutional under the First Amendment. His amended complaint names the Colorado Attorney General and the District Attorney as defendants.

Colorado's criminal libel statute provides:

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel.
>
> (2) It shall be an affirmative defense that the publication was true, except libels tending to

> blacken the memory of the dead and libels tending to expose the natural defects of the living.
>
> (3) Criminal libel is a class 6 felony.

Colo.Rev.Stat. § 18-13-105.

Mink's primary contention is that the Colorado criminal libel statute is overbroad because it implicates conduct that is constitutionally protected. In support of his argument, Mink points to United States Supreme Court case law requiring a party bringing a libel action to prove (1) fault of the speaker and (2) falsity of the statement. Specifically, the Supreme Court has held false statements on matters of public concern regarding public figures are protected unless they are made with "actual malice"—i.e., with knowledge the statements are false or with reckless disregard as to whether they are false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). False statements on matters of public concern regarding private figures are protected unless they are made negligently. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 352, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). In public concern cases, the party bringing the action also bears the burden of proving the falsity of the statement. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).

Mink alleges *The Howling Pig* was devoted to matters of public concern to the UNC community, such

as lack of faculty diversity and free speech on campus. Further, he alleges Professor Peake often voiced his views publicly and has therefore arguably rendered himself a public figure for First Amendment purposes. Mink does not, however, bring an "as applied" challenge to the statute. Instead, he argues the statute is unconstitutional on its face because it punishes libelous statements with no fault requirement and without placing the burden of proving falsity on the prosecutor.

Mink further contends the Colorado Supreme Court's subsequent interpretation of the statute does not cure the constitutional infirmities. The United States Supreme Court has long respected the ability of state high courts to narrow overbroad statutes so as to solve constitutional problems. *Osborne v. Ohio*, 495 U.S. 103, 119, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990). In 1991, the Colorado Supreme Court narrowed the potential scope of the criminal libel law in *People v. Ryan*, 806 P.2d 935 (Colo.1991):

> From the United States Supreme Court's pronouncements concerning libel we discern a precise category of protected conduct that falls outside of the legitimate sweep of section 18-13-105. That category consists of libelous statements about public officials or public figures involving matters of public concern. This category of constitutionally protected conduct gives us a clear line by which to distinguish the statute's constitutional and unconstitutional applications. We therefore

> hold that section 18-13-105 is *invalid only insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern.* Our partial invalidation, however, affects only the application of subsection (1) of the statute. Truth shall remain an affirmative defense pursuant to section 18-13-105(2) . . . and article II, section 10, of the Colorado Constitution.

Id. at 940-41(footnotes omitted).

According to Mink, *Ryan* did not limit the statute's applicability with regard to statements made about *private* individuals on matters of *public* concern, and thus the law continues to run afoul of the First Amendment. He claims these statements are still punishable under Colorado law, even when made non-negligently and even when the party bringing the action has not proven their falsity.[3]

With that backdrop, we turn to the procedural posture of Mink's constitutional claim in light of the district attorney's disavowal of an intent to prosecute him under the statute.

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3. That the plaintiff must prove falsity flows from *Ryan's* constitutional analysis. Moreover, the Colorado Supreme Court had previously ruled that truth is a defense under the statute. *Gomba v. McLaughlin*, 180 Colo. 232, 504 P.2d 337 (1972); *see also Diversified Management v. Denver Post*, 653 P.2d 1103 (Colo.1982) (discussing speech protections for matters of public concern).

2. Jurisdiction-Standing and Mootness

To pursue a case in federal court, a plaintiff must satisfy the twin requirements of standing and mootness. *Winsness v. Yocom*, 433 F.3d 727, 731 (10th Cir.2006). Without a live, concrete controversy, we lack jurisdiction to consider claims no matter how meritorious. Because we conclude Mink faces "no credible threat of prosecution" under the criminal libel statute, he lacks standing to pursue his claims for prospective relief.[4] For the same reasons, we also conclude his claim is moot. Therefore, we cannot reach the merits of his constitutional challenge to the statute.

a. Standing. To establish standing, Mink must show (1) he has suffered an injury in fact, (2) traceable to the defendants, (3) that can be redressed by a favorable decision of this Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). A plaintiff's injury must be "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560, 112 S.Ct. 2130.

In freedom of expression cases, injury in fact can be shown by alleging (1) "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute," and (2) "a credible

4. The deputy district attorney has not challenged Mink's standing to pursue the statutory and common law damages claims.

threat of future prosecution." *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir.2003). "Allegations of possible future injury do not satisfy the injury in fact requirement, though a plaintiff need not expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Initiative & Referendum Inst. v. Walker*, 450 F.3d at 1087-88 (internal quotations omitted). But the "mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Winsness*, 433 F.3d at 732.

To satisfy the injury in fact requirement, the plaintiff must demonstrate that expressive activities will be inhibited by "an objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following from the statute's enforcement." *Id.* While "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," *O'Shea v. Littleton*, 414 U.S. 488, 496, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), they do not confer standing to pursue prospective relief without some credible threat of future injury. *See Los Angeles v. Lyons*, 461 U.S. 95, 108, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). "[A]ssurances from prosecutors that they do not intend to bring charges are sufficient to defeat standing, even when the individual plaintiff had actually been charged or directly threatened with prosecution for the same conduct in the past."

Winsness, 433 F.3d at 731 (quoting *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir.2004)).

But standing is determined at the time the action is brought, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), and we generally look to when the complaint was first filed, not to subsequent events. *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1153 (10th Cir.2005) (internal citations omitted). In this case, however, the standing inquiry is complicated by the unique timeline of events. Mink's original and amended complaint both allege that as of January 8, 2004, Mink "face[d] an imminent threat of being charged with a violation of Colorado's Criminal Libel Statute." Aplt.App. at 77. Before answering the complaint, the district attorney's office concluded it could not prosecute the case and issued a "No File" decision on January 20, 2004. Mink filed an amended complaint on February 19, 2004. Although an investigation was pending at the time the complaint was filed, the threat of prosecution was still speculative at that time. Moreover, by the time he filed the amended complaint, even the investigation had entirely dissipated. We look to the amended complaint in assessing a plaintiff's claims, including the allegations in support of standing. And since an amended complaint "supercedes an original complaint and renders the original complaint without legal effect," *In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir.2000); 3 Moore's Federal Practice, § 15.17[3] (Matthew Bender 3d ed.), the justiciability of Mink's constitutional claim is further cast in doubt.

Given this procedural posture, our cases suggest several outcomes:

(1) In *Faustin v. City & County of Denver*, 268 F.3d 942 (10th Cir.2001), we held the disavowal of an intent to prosecute under a statute *prior* to the filing of a complaint defeated standing.

(2) In *D.L.S. v. Utah*, 374 F.3d 971 (10th Cir.2004), we held the disavowal of an intent to enforce a criminal sodomy statute against the plaintiff *after* the complaint was filed, even if it might be enforced against another class of persons, was enough to defeat standing.[5]

(3) Finally, in *Winsness v. Yocom*, 433 F.3d 727 (10th Cir.2006), we found lack of standing in two situations where the plaintiff sought prospective relief from prosecution under a statute: (a) where the plaintiff "received assurances from the District Attorney that the flag-abuse statute [would] not be enforced against him" though the assurances came "after [the plaintiff] filed his lawsuit," *id.* at 733; and (b) where the plaintiff was already cited for flag-abuse, but the prosecutor quickly dropped the charges and disavowed an intent to prosecute before the plaintiff filed his suit.

Each of these cases concluded the plaintiff lacked standing because he could not establish a "credible fear of prosecution" under the challenged statute. Mink's

5. The only distinction between *D.L.S.* and the present case is that the *D.L.S.* plaintiff was not exposed to prior threat of prosecution.

facts differ only slightly from these precedents. Uniquely, the disavowal of prosecution in this case came *between* the time the lawsuit was filed and the filing of the amended complaint. At the time the original complaint was filed, moreover, police had conducted a search of Mink's residence, seized his computer and papers, and were retaining them pending further investigation. Attempts by Mink's counsel to dissuade the district attorney from charging him had yet to bear fruit. Thus, when he brought the suit Mink appeared to have a legitimate basis for alleging a credible fear of future prosecution.

Nonetheless, we conclude Mink lacks standing under our case law. First, based on his review of controlling Supreme Court precedents, the district attorney disclaimed an intent to prosecute immediately after the lawsuit was filed. In both *D.L.S.* and *Winsness*, the prosecutor's quick disavowal of an intent to prosecute demonstrated a lack of injury in fact.[6] No charges were ever filed against Mink and the district attorney publicly announced he would not prosecute well before his office filed an answer or motion to dismiss. Where a plaintiff only seeks prospective relief, standing is defeated when there is evidence the government will not enforce the challenged statute against the plaintiff. *See, e.g., Harmon v. City of Kansas City*, 197 F.3d 321, 327(8th Cir.1999) (plaintiffs lost standing to seek an injunction

6. Similarly, the city attorney in *Faustin* apparently concluded prior to the filing of the complaint that the statute could not be applied to the plaintiff, although that conclusion was not disclosed until after the case commenced.

when city conceded all of their activities were constitutionally protected and were not prohibited by the ordinance).

Second, it is significant Mink filed an amended complaint after the district attorney disclosed his intent not to prosecute. The sequence of events confirms Mink had no "injury in fact" for prospective relief when he filed his amended complaint.[7] Any threat against Mink at that time was "hypothetical," not "actual and imminent."

Finally, although the "No File" letter conceivably might not bind other district attorneys, we have held the "possibility" of future enforcement need not be "reduced to zero" to defeat standing. *Winsness*, 433 F.3d at 733. It is "not necessary for defendants [ ] to refute and eliminate all possible risk that the statute might be enforced" to demonstrate a lack of a case or controversy. *Id.* Since this case commenced, moreover, the office of *both* the Attorney General and the District Attorney has changed hands with no change in the government's position that the statute will not be enforced against Mink.[8]

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7. *See In re Atlas Van Lines, Inc.*, 209 F.3d 1064, 1067 (8th Cir.2000).

8. Both the current Attorney General and District Attorney, and their predecessors, firmly rejected any intent to prosecute Mink under the statute before the district court, in their submissions to us, and in oral argument. We take them at their word.

Mink, however, suggests the district attorney fumbled away its disavowal by admitting in the answer to the amended complaint that Mink faced an imminent threat of prosecution. In the context of the procedural posture of this case and especially in light of the district attorney's "No File" letter, this oversight is of no significance. It is obvious no charges against Mink would be pursued, and, as we have explained, "[n]othing in our case law prevents government actors from responsibly retreating from an ill-advised prosecution, in response to controlling Supreme Court authority." *Winsness*, 433 F.3d at 736.

The government should be encouraged, not dissuaded, from assuring citizens that it will not pursue prosecutions based on statutes that cannot be constitutionally enforced. Given the realities of a public law office, it is not surprising the ultimate legal conclusion here—the case could not be prosecuted—would be made at the highest policy levels. By jumping the gun and filing a complaint for prospective relief, a plaintiff cannot retain standing where the prosecutor immediately concludes the statute cannot be constitutionally enforced.

Based on the representations of the public officials charged with enforcing the statute against Mink, we agree with the district court that "no credible threat of prosecution" existed when Mink filed his amended complaint. Thus, he lacks standing to seek prospective relief.

b. Mootness. Even if we were to assume a credible threat of prosecution existed before the lawsuit was filed, we also conclude Mink's claim for prospective relief is moot. "[I]t is not enough that a dispute was very much alive when suit was filed, or when review was obtained," a live controversy must remain throughout the litigation. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Article III of the Constitution limits us to live controversies that exist at *all* stages of litigation, including appellate review. *Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Ass'n*, 420 F.3d 1082, 1088 (10th Cir.2005). When "intervening acts destroy a party's legally cognizable interest" in the lawsuit, the federal courts are deprived of jurisdiction. *Id.*

Merely stopping the complained of conduct ordinarily is not enough, however, to establish mootness. "For good reason, courts are reluctant to deem a controversy moot based merely on assurances from the defendants that they will not engage in unlawful activity again." *Winsness*, 433 F.3d at 736 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, [in part because] . . . [t]he defendant is free to return to his old ways.")). Instead, a defendant must show "no reasonable expectation that the wrong will be repeated." *W.T. Grant Co.*, 345 U.S. at 633, 73 S.Ct. 894 (internal citations and quotations omitted). But in many circumstances it is obvious previously threatened conduct cannot reasonably be

expected to recur. *See, e.g., Tandy v. City of Wichita*, 380 F.3d 1277, 1291 (10th Cir.2004) (finding a controversy moot because a city had provided documents demonstrating it had changed its practices to comply with federal law and because "[n]othing in the record suggests [the defendant] intends to resume its discontinued policies....").

We recently discussed mootness in a First Amendment declaratory judgment case challenging Utah's flag desecration statute. *Winsness*, 433 F.3d 727. In *Winsness*, a Salt Lake City resident burned a symbol onto a United States flag and hung the flag on his garage. A neighbor reported the incident to police, and Winsness was cited for flag-abuse. The flag was confiscated as evidence. After the citation was filed, prosecutors concluded the ordinance could not be constitutionally enforced against Winsness and "immediately scuttled" the case. The district attorney filed an affidavit with the court assuring it that charges would not be pursued. Based on that record, we concluded that "[e]ven if we assume that a credible threat of prosecution existed before this lawsuit was filed, the prosecutors' affidavits have rendered the controversy moot." *Winsness*, 433 F.3d at 736. The government had "foresworn any intention to bring criminal charges against individuals who alter the flag for expressive purposes" and had "categorically announc[ed]" the office would "bring no prosecutions under the statute." *Id.* at 736. We found these assurances established mootness since the government (1) had quickly repudiated the action initially taken against Winsness, (2) its statements were

made in sworn affidavits, and (3) it based its decision on controlling Supreme Court precedent, making future prosecutions unlikely.

These factors similarly cut against Mink. First, no citation or formal charges were ever brought against Mink. And prior to the filing of charges the district attorney preemptively issued a legal opinion that precluded prosecution. His opinion letter explained the statute could not be constitutionally applied to the conduct attributed to Mink, and, accordingly, charges would not be filed in this matter.

Second, although the "No File" decision was not in the form of an affidavit, the district attorney took an unequivocal position (1) advising Mink in writing, and (2) advising the court that Mink would not be prosecuted under the statute now or in the future. We find persuasive, as did the district court, the district attorney's repudiation of an intent to prosecute, and its representation of the same to us on appeal.

Finally, the parties concede on appeal that Supreme Court precedent makes enforcement of the Colorado criminal libel statute unconstitutional under the facts as alleged here. The parties have conceded Professor Peake is a public figure, and well established case law requires falsity and actual malice to prove libel. *Gertz*, 418 U.S. 323, 94 S.Ct. 2997. Moreover, the Colorado Supreme Court has interpreted that statute to embody these standards. *People v. Ryan*, 806 P.2d 935 (Colo.1991). Accordingly, the district attorney recognized the force

of these precedents and his "No File" decision supports our conclusion that the third *Winsness* factor has been met in this case.

Despite these assurances, Mink contends the district attorney's disavowal is limited to the specific statements made in the first three issues of *The Howling Pig* and does not apply more broadly to the *type* of statements that sparked this controversy or to those statements which might appear in future editions of the publication. In short, he claims that without a ruling that the Colorado criminal libel law is unconstitutional, he may be subject to prosecution in the future. We find this argument unpersuasive. The analysis provided by the attorney general and district attorney demonstrate their legal reasons for not enforcing the statute in this case would carry over to further statements of the type Mink has subsequently made or intends to make. Although the district attorney's "No File" decision was based upon the pending investigation, we see no reason his analysis would not apply to subsequent statements that are legally indistinguishable.

In short, we see no credible threat of prosecution against Mink. The district attorney did what one would hope from a public official: he "responsibly retreat[ed] from an ill-advised prosecution, in response to controlling Supreme Court authority." *Winsness*, 433 F.3d at 736. Because standing and mootness are jurisdictional and non-waivable, *Moongate Water Co.*, 420 F.3d at 1088, we need not consider the merits of Mink's First Amendment challenge to the Colorado criminal libel statute in this case.

B. Damages Claim under Privacy Protection Act

Mink also seeks damages under 42 U.S.C. § 1983 for alleged violations of the Privacy Protection Act. The Act creates a right of action for the improper seizure of media materials:

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if . . . there is probable cause.

42 U.S.C. § 2000aa.

Mink alleges his statutory rights were violated when Greeley police entered his home and seized materials relating to *The Howling Pig.* He does not, however, name any of the officers who conducted the search.[9] Instead,

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9. Mink initially sued both police officials and the City of Greeley but voluntarily dropped both of those claims.

he seeks a judgment against the deputy district attorney for her role in reviewing the affidavit in support of the search warrant, which he claims lacked probable cause. Relying on the text of the statute, which makes it unlawful "to *search for or seize* any work product materials," the district court dismissed the claim. Here, Mink did not allege the district attorney directed, controlled or participated in the search or seizure. Since the statute includes no language covering predicate acts by other officials, such as the legal review of the warrant application, the district court concluded no liability attached to the district attorney.

We agree. The plain language of the statute precludes liability for a person who did not engage in a search. In an analytically similar case, *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir.1996), the Eighth Circuit concluded the statute covered only a defendant who "directed, supervised, or otherwise engaged in the *execution* of the warrant to such an extent that a finding can be made that she 'searched for or seized' the [materials]." *Id.* at 1356 (emphasis added). In *Citicasters*, the facts centered around the prosecutor's actions taken *after* the search warrant was issued and involved an allegation that the prosecutor actively assisted in the search. Here, by contrast, Mink has not alleged any conduct that could be construed as assisting in the warrant's execution.

Accordingly, we affirm dismissal of this claim against the deputy district attorney.

C. Damages Claim Against the District Attorney

The most difficult issue in this case is Mink's claim for damages against the deputy district attorney based on her review of the application for a search warrant. The district attorney argues that this conduct is protected by the doctrine of absolute prosecutorial immunity. The district court agreed, concluding the prosecutor acted as "an officer of the court" in a "quasi-judicial" capacity to which absolute immunity applied.

1. Legal Framework

Absolute prosecutorial immunity is a complete bar to a suit for damages under 42 U.S.C. § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The doctrine evolved from the absolute immunity judges historically enjoyed for "any judicial act done by them within their jurisdiction." *Bradley v. Fisher*, 13 Wall. 335, 80 U.S. 335, 351, 20 L.Ed. 646 (1871).

Traditionally, the doctrine did not apply to other public officials—such as police officers, governors, and other executive officials—who were entitled only to qualified immunity for actions performed in their official capacity. Under the common law, the scope of immunity for prosecutors was limited to suits for malicious prosecution and defamation, although its reach in § 1983 damages cases was unclear. *Imbler*, 424 U.S. at 421, 96 S.Ct. 984.

a. Supreme Court Framework. The Supreme Court developed the modern doctrine of prosecutorial immunity in § 1983 cases in a series of cases beginning in 1976. In *Imbler v. Pachtman*, the Court rejected the argument that limited, or qualified, immunity would be adequate to protect the prosecutor from the threat of litigation that could shade their otherwise independent judgment. Merely providing qualified immunity would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." 424 U.S. at 427-28, 96 S.Ct. 984. According to the Court, it was "better to leave unredressed the wrongs done by dishonest officers [of the court] than to subject those who try to do their duty to the constant dread of retaliation." *Id.* at 428, 96 S.Ct. 984 (quoting Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir.1949)). Thus, prosecutors are absolutely immune for those activities "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430, 96 S.Ct. 984. To apply this standard, the Court crafted a "functional approach" by which we examine only the actions taken by the prosecutor "in initiating [ ] and in presenting the State's case" for trial. *Id.* at 431, 96 S.Ct. 984.

The Supreme Court was careful to note, however, that not every activity of a prosecutor involves initiating and presenting a case. Absolute immunity does not extend to "those aspects of the prosecutor's responsibility that cast him in the *role of an*

administrator or investigative officer rather than that of advocate." *Id.* at 430-31, 96 S.Ct. 984 (emphasis added):

> We recognize that the duties of the prosecutor in his role as an advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . *Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court.* Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.

Id. at 431 n. 33, 96 S.Ct. 984 (emphasis added). Concluding the challenged conduct in *Imbler* fell on the advocacy side of the spectrum, the Court granted the prosecutors absolute immunity against the claim that they had procured false testimony during the course of a criminal trial.

The Supreme Court later extended the doctrine of absolute immunity to some prosecutorial conduct occurring *before* trial. In *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), a prosecutor was accused of (1) eliciting false testimony in a probable cause hearing that led to the issuance of a search warrant, and

(2) advising police on inappropriate methods of interrogating a suspect.

Regarding the probable cause hearing, the Court concluded absolute immunity extended to "any hearing before a tribunal which performed a judicial function" and included the presentation of testimony in support of an application for a search warrant. *Id.* at 490, 111 S.Ct. 1934 (internal quotations omitted). "The prosecutor's actions at issue here—appearing before a judge and presenting evidence in support of a motion for a search warrant—clearly involve the prosecutor's role as *advocate* for the State, rather than his role as administrator or investigative officer, the protection for which we reserved judgment in *Imbler*." *Id.* at 491, 111 S.Ct. 1934 (internal quotations omitted) (emphasis added).[10] The Court went on to observe, "since the issuance of a warrant is unquestionably a judicial act, appearing at a probable-cause hearing is intimately associated with the judicial phase of the criminal process." *Id.* at 479, 111 S.Ct. 1934 (internal citations and quotations omitted).

Burns, however, did not extend absolute immunity to every aspect of the prosecutor's legal advice to police. The Supreme Court concluded that advising police in the investigative phase of a criminal case could be too

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10. Importantly, the Court read the plaintiff's claim narrowly and did not consider the prosecutor's motivations in seeking the search warrant or his actions outside the courtroom in relation to his procurement of the warrant. *See id.* at 487-89 & n. 5, 111 S.Ct. 1934.

far removed from the judicial process to warrant extending immunity on that basis. It thus rejected the argument that legal advice is categorically "of a judicial nature because the prosecutor is, like a judge, called upon to render opinions concerning the legality of conduct." *Id.* at 493, 111 S.Ct. 1934 (internal quotations omitted). Noting it had previously rejected the extension of absolute immunity to police officers, the Court found it "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following [that] advice." *Id.* at 495, 111 S.Ct. 1934.

The Court also rejected the government's argument that "giving legal advice is related to a prosecutor's role[ ] in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process." *Id.* As the Court pointed out, "Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute." *Id.* "We do not believe, however, that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process,' that it qualifies for absolute immunity." *Id.* at 493, 111 S.Ct. 1934 (quoting *Imbler*, 424 U.S. at 430, 96 S.Ct. 984).[11]

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11. Justice Scalia, in a concurrence, would have gone further. He concluded that there is "no absolute immunity for procuring a search warrant" since that act is so far "removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." 500 U.S. at 504-05, 111 S.Ct. 1934 (quoting *Malley v. Briggs*, 475 U.S. 335, 342-43, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

To qualify for absolute immunity, then, an action must be "closely associated with the judicial process." *Id.* at 495, 96 S.Ct. 984. Advising police on interrogation methods or "the existence of probable cause" does not qualify. *Id.* at 487, 96 S.Ct. 984.

The Supreme Court refined the investigative/advocacy distinction in *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). In that case, the plaintiff accused prosecutors of fabricating evidence during the preliminary investigation of a crime. In finding the pretrial investigation was not entitled to absolute immunity, the Court emphasized, "We have not retreated . . . from the principle [articulated in *Burns*] that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Id.* at 273, 113 S.Ct. 2606. But there is "a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Id.* The Court ultimately concluded that, where there is no common-law tradition of immunity for a function, a prosecutor "neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274 & n. 5, 113 S.Ct. 2606.

The Supreme Court's final and most recent case on prosecutorial immunity is similarly instructive. In *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), a prosecutor was sued for her (1) preparation and filing of an information and motion for an arrest warrant, and (2) attestation to the truth of the facts contained in the accompanying affidavit. The Court found absolute immunity for the first activity but not for the second. It concluded the preparation and filing of the information and motion "was part of the advocate's function," *id.* at 129, 118 S.Ct. 502, since she was acting as an advocate in "her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court . . . indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause." *Id.* at 130, 118 S.Ct. 502.

In contrast, attesting to the accuracy of the facts in the affidavit, the prosecutor was acting as a complaining witness rather than a lawyer. *Id.* at 129, 118 S.Ct. 502. The key, according to the Court, was whether the task "involved the exercise of professional judgment," not merely the review of the "truth or falsity of the factual statements themselves." *Id.* at 130, 118 S.Ct. 502.

b. Tenth Circuit Framework. We have applied the above Supreme Court precedent in a variety of contexts. In *Roberts v. Kling*, 104 F.3d 316, 319 (10th Cir.1997), for example, we found absolute immunity applied to a

deputy district attorney who approved a criminal complaint for prosecution. We emphasized, however, that ours is a "continuum based approach" and the "more distant a function is from the judicial process, the less likely absolute immunity will attach." *Id.* at 318-19 (quoting *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir.1994)). The "determinative factor is 'advocacy' because that is the prosecutor's main function and the one most akin to his quasi-judicial role." 104 F.3d at 319.

But "absolute immunity may attach even to . . . administrative or investigative activities when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir.1991). Thus, we have found absolute prosecutorial immunity for (1) preparation and initiation of charges, *id.;* (2) prosecuting civil and administrative enforcement proceedings, *Snell v. Tunnell*, 920 F.2d 673 (10th Cir.1990); and (3) investigating and filing a commitment proceeding, *Scott v. Hern*, 216 F.3d 897 (10th Cir.2000).

c. Summary. As the above cases demonstrate, there is no bright line between advocacy and investigation. It is clear that a prosecutor's courtroom conduct falls on the advocacy side of the line. *Buckley*, 509 U.S. at 274, 113 S.Ct. 2606. And it is equally clear that advocacy is not limited to filing criminal charges or arguing in the courtroom. *Id.* at 272, 113 S.Ct. 2606. Thus, especially when considering pre-indictment acts, it is important to consider other factors, such as (1) whether the action is closely associated with the judicial process,

Burns, 500 U.S. at 495, 111 S.Ct. 1934, (2) whether it is a uniquely prosecutorial function, *id.* at 491 n. 7, 111 S.Ct. 1934, and (3) whether it requires the exercise of professional judgment, *Kalina*, 522 U.S. at 130, 118 S.Ct. 502.

In sum, a prosecutor is entitled to absolute immunity for those actions that cast him in the role of an advocate initiating and presenting the government's case. Absolute immunity, however, does not extend to those actions that are investigative or administrative in nature, including the provision of legal advice outside the setting of a prosecution. *See Imbler*, 424 U.S. at 430-31, 96 S.Ct. 984; *Burns*, 500 U.S. at 486, 493-94, 111 S.Ct. 1934.

2. Application

We now turn to whether absolute immunity applies to the deputy district attorney's review of the affidavit in support of the search warrant in Mink's case. For the following reasons, we conclude the district attorney was not wearing the hat of an advocate and, thus, is not entitled to absolute prosecutorial immunity.

As a preliminary matter, the district attorney does not contend she acted as an advocate "intimately involved" in a judicial proceeding. Rather, she alleges her role was limited to review and approval of the search warrant application; she does not even contend she evaluated whether probable cause existed to arrest or press charges. At the time she reviewed the affidavit, moreover, police had only the allegations of Professor

Peake and had not yet confirmed the authorship of the articles contained in *The Howling Pig*. It is obvious the search of Mink's residence was part of a continuing effort to obtain evidence and the attorney's review was, at most, legal advice as to the sufficiency of the affidavit. It is also clear that the district attorney was far from filing charges at the time of the search, and subsequent events show that the office came to believe the case could not be prosecuted.

Second, the review of the affidavit cannot be said to be a uniquely prosecutorial role. While it is laudable that a legal review occur before the police proceed to a magistrate for a warrant, the Supreme Court made it clear in *Burns* that a legal review for the sufficiency of evidence to support probable cause is not sufficient to confer absolute immunity. Absolute immunity applies to the "prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Burns*, 500 U.S. at 494, 111 S.Ct. 1934. And while it may at times be difficult to discern the line between "investigation" and "advocacy," here we do not even have a case where the prosecutor was preparing for her "role as advocate for the State." *Buckley*, 509 U.S. at 271, 113 S.Ct. 2606. No one suggests that the district attorney was preparing for a judicial proceeding in merely reviewing the affidavit.

Finally, although the review of the affidavit can be said to require the exercise of professional judgment, that is true every time a prosecutor provides legal advice. Under the Supreme Court's functional approach, we look

to which role the prosecutor is performing-advocate or investigator. Here, the review of the affidavit squarely falls on the side of investigatory legal advice, and not advocacy before a judicial body. The deputy district attorney played no role in preparing the affidavit, nor was she involved in preparing, analyzing, and presenting pleadings to a court. If she were, this would be quite a different case.

We acknowledge this conclusion is complicated by those cases where prosecutors have been absolutely immunized for drafting, filing, and arguing in support of an arrest or search warrant. *See Kalina*, 522 U.S. at 129-31, 118 S.Ct. 502(arrest warrant); *Burns*, 500 U.S. at 487, 111 S.Ct. 1934 (search warrant). And the Supreme Court has explicitly recognized "the issuance of a search warrant is unquestionably a judicial act." *Burns*, 500 U.S. at 492, 111 S.Ct. 1934. In those cases, however, the prosecutor was acting as an advocate-evaluating evidence, preparing pleadings, and appearing in court. It may be true that a lawyer's more active involvement in preparing a warrant application and presenting it in court will confer absolute immunity. But in this case the prosecutor's function was not that of an advocate; her function was to provide legal advice outside the courtroom to aid a nascent investigation. The "premise of *Burns* was that, in providing advice to the police, the prosecutor acted to guide the police, not to prepare his own case." *Buckley*, 509 U.S. at 285, 113 S.Ct. 2606 (Kennedy, J., concurring). Here, the prosecutor was not preparing her case. Accordingly, in these circumstances, immunity does not attach.

The district attorney urges us to consider her reliance on Colorado law in support of a finding of absolute immunity. Colorado law requires district attorneys to "render, in their quasi-judicial capacity, legal advice to peace officers, upon the request of such officers or of the court, pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures . . ." and confers "immun[ity] from liability" under state law. Colo.Rev.Stat. § 20-1-106.1. As the district court correctly noted, however, a state statute—even one requiring affirmative action—cannot create immunity from a federal civil rights claim where the functional analysis suggests otherwise. *Howlett v. Rose*, 496 U.S. 356, 375-76, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). And under the Supreme Court's functional analysis we look to what the attorney did—she provided legal advice—and not to what state law requires.

For the foregoing reasons, we conclude the district court erred in dismissing Mink's damages claim on the ground that it was barred by the doctrine of absolute immunity. The deputy district attorney, however, may be entitled to qualified immunity if she reasonably concluded probable cause existed to support the warrant application, or that the application of the Supreme Court's First Amendment cases to the criminal libel statute was not clearly established under the circumstances here.

The district court did not address the application of qualified immunity in these circumstances, and we decline to do so in the first instance. Accordingly, we remand that issue to the district court.

IV. Conclusion

We AFFIRM the district court's dismissal of Mink's claims for declaratory relief and for damages under the Privacy Protection Act. We REVERSE the district court's decision to dismiss Mink's claim for damages based on absolute prosecutorial immunity, and REMAND for consideration of the district attorney's claim for qualified immunity.

APPENDIX B — MEMORANDUM ORDER AND OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND FILED OCTOBER 26, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 04-B-23 (CBS)

THOMAS MINK, and THE HOWLING PIG,
an unincorporated association,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as Attorney General of the State of Colorado, A.M. DOMINGUEZ, JR., District Attorney for the 19 Judicial District, in his official capacity, and SUSAN KNOX, a Deputy District Attorney working for the 19 Judicial District Attorney's Office, in her individual capacity,

Defendants.

October 27, 2004

MEMORANDUM ORDER AND OPINION

BABCOCK, Chief Judge.

The Plaintiffs in this case, Thomas Mink ("Mr.Mink") and The Howling Pig ("THP"), have filed a Motion for Partial Summary Judgment. The Defendant Ken Salazar, Attorney General of Colorado ("Attorney General"), and

the Defendant Susan Knox ("Knox") have each filed motions to dismiss and Ms. Knox has moved, in the alternative, for partial summary judgment. In addition to the briefs of the parties, I have received the Amici Curiae briefs of the State of Colorado, the Colorado Press Association and the Reporter's Committee For Freedom of the Press on the constitutionality of Colorado's criminal libel statute, Colo.Rev.Stat. § 18-13-105 ("Libel Statute"), an issue the Plaintiffs have raised in this case. The Motions are adequately briefed and oral argument would not materially aid their resolution. For the reasons stated below, I GRANT the Defendants' Motions to Dismiss and DENY the Plaintiffs' Motion for Partial Summary Judgment.

I. The Complaint

The First Amended and Supplemental Complaint ("Amended Complaint") alleges the following.

In the fall of 2003, Mr. Mink, a student at the University of Northern Colorado ("UNC"), began publishing THP, an internet-based journal concerned with current events affecting the UNC community. Mr. Mink created, maintained, and published THP using a computer that he shared with his mother in his mother's house. Among other things, THP featured a regular column from its purported editor, a fictitious character named "Mr. Junius Puke." The column included doctored photographs of an actual UNC professor named Junius Peake ("Professor Peake"). The Amended Complaint alleges, "The editorial column attributed to 'Professor

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Puke' spoofs and parodies Professor Peake by addressing subjects on which the real professor would be unlikely to write, or through the assertion of views diametrically opposed to those of Professor Peake." Amended Complaint, 5-6.

Professor Peake, not amused, contacted the District Attorney's office, launching an investigation into Mr. Mink's alleged calumny. The investigation encompassed Mr. Mink's personal computer, which the Greeley Police Department seized from Mr. Mink's residence pursuant to a search warrant reviewed by Ms. Knox and approved by a magistrate, unidentified written materials of Mr. Mink's, and records and email communications subpoenaed from Yahoo, Inc., which hosts THP's web site, pursuant to a court order sought by Ms. Knox and issued by a court pursuant to Colo.Rev.Stat. § 16-3-301.1. Under threat of a charge of criminal libel, Mr. Mink allegedly stopped publishing THP for a time.

The computer has now been returned and two new editions of THP have since appeared. The Amended Complaint states, "The Howling Pig and Mr. Mink intend to publish future issues containing articles that could be construed as violating [the Libel Statute]." Amended Complaint, 12. The District Attorney has assured that no charges based upon the contents of the first three editions of THP will be filed, but Mr. Mink fears prosecution for defamatory materials that he may publish in the future. Amended Complaint, 13.

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The Amended Complaint contains statements to the effect that Plaintiffs' counsel "explained" to various investigatory officials the unconstitutionality of their actions and that a "reasonable prosecutor would have known, or upon reasonable investigation could have discovered, . . . that Professor Peake was widely known for publicly expressing his views and was a public official or public figure." Amended Complaint, 6. The Plaintiffs allege, "Without intervention from this Court, Plaintiffs will have to choose whether to risk criminal prosecution or forego engaging in what they believe to be constitutionally-protected expression." Amended Complaint, 14.

The Complaint asserts claims against the Attorney General and A.M. Dominguez, Jr., in his official capacity as District Attorney for the 19th Judicial District ("District Attorney"), under 42 U.S.C. § 1983 and the First and Fourteenth Amendments for infringement of free speech ("First Claim"); against Ms. Knox under 42 U.S.C. § 2000aa *et seq.* for invasion of privacy ("Second Claim"); against Ms. Knox under 42 U.S.C. § 1983 and the First and Fourth Amendments for an unreasonable search and seizure ("Third Claim"); and against Ms. Knox under 18 U.S.C. § 2701 *et seq.* for review of electronic communications without a search warrant and without probable cause ("Fourth Claim"). The Plaintiffs seek damages from Ms. Knox and a declaratory judgment holding that the Libel Statute is unconstitutional on its face.

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II. Ms. Knox's Motion to Dismiss

Ms. Knox moves for dismissal of the three counts of the Amended Complaint directed at her.

A. Second Claim

The Second Claim is predicated upon the Privacy Protection Act, 42 U.S.C. § 2000aa ("PPA"), which states, *inter alia*,

> Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—
>
> (1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: *Provided, however*, That a government officer or employee may not search for or seize such

> materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein. . . .

42 U.S.C. § 2000aa(a) (emphasis original).

Ms. Knox argues that the Plaintiffs have failed to allege facts sufficient to state a claim under the PPA. She construes strictly the volitional element of the PPA; she did not "search for or seize" any work product materials possessed by the Plaintiffs. The only actions that the Amended Complaint attributes to Ms. Knox are review and approval of the affidavit that provided the basis for the search warrant. Because she was not present during the execution of the search warrant at the Mink residence, Ms. Knox asserts that her actions cannot fall within the PPA's purview.

The Plaintiffs argue that Ms. Knox comes within the statute notwithstanding her absence during the search, because, in passing the statute, Congress was accepting an invitation extended by the Supreme Court in *Zurcher v. Stanford Daily*, 436 U.S. 547, 567, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978). They divine Congress' intent by a tenuous line—because the defendants in *Zurcher*, against whom the Supreme Court found no cause of action could be brought, included a district attorney who might not have been present during the search at issue (the decision does not say), Congress must not have

intended to require a defendant's physical presence during the search. Whether or not Congress was attempting to remedy the specific injustice that the Plaintiffs perceive in *Zurcher*, no ambiguity in the statute makes resort to such opaque legislative intent necessary. *United States v. Botefuhr*, 309 F.3d 1263, 1279 (10th Cir.2002).

Ms. Knox cites to dicta in *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir.1996) for the proposition that physical presence during the execution of the search warrant is a prerequisite to liability under the PPA; a similar argument made in that case was "well taken." *Citicasters*, 89 F.3d at 1356. The *Citicasters* court did not, however, rely on the circumstance of the defendant's whereabouts. The rule enunciated by the *Citicasters* court is whether the defendant "directed, supervised, or otherwise engaged in the execution of the warrant to such an extent that a finding can be made that she 'searched for or seized' " the materials. *Citicasters*, 89 F.3d at 1356.

Ms. Knox's absence during the search does not dispose of the question one way or the other. However, the Plaintiffs have not alleged any action that could be construed as engagement in the warrant's execution. Nothing in the PPA or *Citicasters* indicates that review of the probable cause for a warrant application, without more, constitutes involvement in the *execution* of the warrant sufficient to create liability. The language of the PPA concerns itself with the search and seizure. Indeed, a search warrant application is irrelevant to the

operation of the PPA; the PPA "does not require an application for a search warrant to describe any exceptions to the Act." *Citicasters*, 89 F.3d at 1356. I conclude that the Plaintiffs have failed to state a claim and the Second Claim must be dismissed.

B. Third Claim

Ms. Knox claims absolute immunity from the Third Claim because, in reviewing and approving the affidavit, she acted in a quasi-judicial function. *See Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Plaintiffs respond that Ms. Knox's actions amounted to legal advice to the police, a non-judicial function, and do not justify absolute immunity. *See Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991).

State prosecuting attorneys are entitled to absolute immunity from Section 1983 actions for conduct "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430, 96 S.Ct. 984. In *Imbler*, the Supreme Court held that a state prosecuting attorney acting within the scope of his duties in initiating and pursuing a criminal prosecution is not amenable to suit under 42 U.S.C. § 1983. The Court declined to distinguish with specificity those prosecutorial activities that are merely administrative, and do not enjoy absolute immunity, from those actions that are immunized. *Imbler*, 424 U.S. at 431 n. 33, 96 S.Ct. 984. Subsequent Supreme Court decisions have clarified somewhat the boundaries of *Imbler* immunity. A

prosecutor enjoys absolute immunity for preparing and filing an information and for moving for an arrest warrant, *see Kalina v. Fletcher*, 522 U.S. 118, 129, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), but only qualified immunity for acting as a complaining witness in averring a complaint for arrest and its supporting affidavit, *see Kalina*, 522 U.S. at 129-130, 118 S.Ct. 502. Investigation of the evidence against a potential criminal defendant prior to his arrest justifies only qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 275, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993). Preparation and presentation of evidence at a probable cause hearing in support of a search warrant application is absolutely immunized, *see Burns*, 500 U.S. at 487, 111 S.Ct. 1934, while advising police about interrogation techniques and the sufficiency of cause for arrest is not, *see Burns*, 500 U.S. at 496, 111 S.Ct. 1934.

I am unpersuaded by the Plaintiffs' claim that the *Burns* decision ends the matter. The superficial resemblance between Ms. Knox's actions and those extended qualified immunity in *Burns* is no stronger than the resemblance Ms. Knox's actions bear to the conduct covered with absolute immunity. Taking the Plaintiffs' allegations as true, Ms. Knox can more correctly be said to have "facilitated the issuance of a search warrant," *see Burns*, 500 U.S. at 487, 111 S.Ct. 1934, than she can be said to have been "providing legal advice to the police," *see Burns*, 500 U.S. at 492, 111 S.Ct. 1934. Nothing in the Amended Complaint indicates that Ms. Knox discussed with police the legal advisability of searching the Mink residence or that she assisted the

police in drafting the warrant in such a way as to increase the likelihood that the magistrate would find probable cause. Instead, the Plaintiffs allege only that Ms. Knox "reviewed and approved the affidavit submitted to the state district court in support of the warrant to search the Minks' home." Amended Complaint, 16.

The Tenth Circuit, trying to derive a definite rule from the Supreme Court's decisions, has stated that "the determinative factor is 'advocacy' because that is the prosecutor's main function and the one most akin to his quasi-judicial role." *Roberts v. Kling*, 104 F.3d 316, 319 (10th Cir.1997), *cert. granted and judgment vacated on other grounds*, 522 U.S. 1025, 118 S.Ct. 623, 139 L.Ed.2d 604 (1997), *aff'd on remand*, 144 F.3d 710 (10th Cir.1998), *cert. denied*, 525 U.S. 1139, 119 S.Ct. 1028, 143 L.Ed.2d 38 (1999). However, the Tenth Circuit has extended absolute immunity to administrative or investigative activities that do not, in a strict sense, constitute advocacy before a tribunal "when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court." *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir.1991) (quoting *Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir.1990)). Also, though the Plaintiffs make much of the fact that no criminal proceedings had commenced against Mr. Mink when Ms. Knox reviewed and approved the warrant affidavit, as *Burns* itself demonstrates, that happenstance is not dispositive; "prosecutorial functions may also involve some activities preliminary to the initiation of an action, including actions away from the courtroom." *Roberts*, 104 F.3d at 319.

Indeed, no bright line emerges from the case law. Instead, the Tenth Circuit has "applied a continuum-based approach to these decisions, stating 'the more distant a function is from the judicial process and the initiation and presentation of the state's case, the less likely it is that absolute immunity will attach.' " *Gagan v. Norton*, 35 F.3d 1473, 1475-1476 (10th Cir.1994), *quoting Pfeiffer*, 929 F.2d at 1490.

Ms. Knox's review of the warrant affidavit was a proximate (and commendable) precursor to the presentation of the affidavit before the magistrate, an undisputably quasi-judicial activity. Had Ms. Knox herself presented the warrant affidavit to the magistrate after reviewing and approving it, all of her actions undoubtedly would have fallen within the immunity extended in *Burns* and *Roberts*. I cannot see how her delegation of the latter task to a police officer affects her immunity for the former. It is not too much to presume that the police brought the affidavit to Ms. Knox for approval in her capacity as an "officer of the court." *Pfeiffer*, 929 F.2d at 1490.

The rationale underlying absolute prosecutorial immunity counsels in favor of recognizing it in this case. The *Imbler* Court explained that the immunity of a prosecutor is based upon the same considerations that underlie the common-law judicial immunities that judges and grand jurors enjoy. *Imbler*, 424 U.S. at 422-423, 96 S.Ct. 984. Subjecting prosecutors to liability for prosecuting unsuccessful cases would, the Court reasoned, undermine performance of the prosecutor's

duties; the "public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler*, 424 U.S. at 424-425, 96 S.Ct. 984. "Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Imbler*, 424 U.S. at 425, 96 S.Ct. 984.

Police ought to be encouraged to bring warrant affidavits to prosecutors before entreating magistrates. Such a practice promotes reliability and judicial economy. Prosecutors are expected to be as knowledgeable as judges concerning the legal requirements of probable cause and are qualified to make the fundamentally judicial determination that an affidavit does or does not meet the legal standard. Prosecutors in such circumstances must, if the practice is to produce just results, be immunized from suit for their decisions as are judges. And prosecutors ought not be discouraged from performing such reviews by the prospect of suit.

An additional consideration for the *Imbler* Court was the heightened difficulty an honest prosecutor would face in asserting a qualified immunity defense because in a vacuum, many decisions that a prosecutor makes can be perceived as constitutional deprivations. *Imbler*, 424 U.S. at 425-426, 96 S.Ct. 984. Qualifying a prosecutor's immunity "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."

Imbler, 424 U.S. at 427-428, 96 S.Ct. 984. Of course, when viewed in context, a prosecutor's advocacy for the state is often counterbalanced by the advocacy of the defense. If a prosecutor presents a witness of dubious credibility, for example, the defense is free to impeach that witness through cross-examination. That countervailing force is absent in this case. However, many adversarial acts of prosecutors—such as presenting evidence for search warrant applications, appearing before grand juries, and swearing out criminal complaints—meet no resistance from defense attorneys but warrant absolute immunity, nonetheless because they are essential to the efficient functioning of the criminal justice system.

Ms. Knox cites to Colorado Revised Statutes Section 20-1-106.1 ("Immunity Act") as a basis of absolute immunity. As state law, the Immunity Act cannot immunize Ms. Knox from a 42 U.S.C. § 1983 claim. *See Howlett v. Rose*, 496 U.S. 356, 376, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). However, in the absence of clear Federal law on the question, the Immunity Act provides a persuasive understanding of what constitutes a quasi-judicial act. It provides that, in the absence of bad faith, prosecutors "shall be immune from liability for the performance of" various "quasi-judicial" duties, including examination and evaluation of an affidavit for a search warrant "before such affidavit is submitted to a judge." Colo.Rev.Stat. § 20-1-106.1(1 and 2). This rule is consistent with the ends outlined in *Imbler*.

Ms. Knox is absolutely immune from liability on the Third Claim.

C. Fourth Claim

The Plaintiffs' Fourth Claim is predicated upon a provision of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2703, which states, *inter alia*,

> (a) Contents of wire or electronic communications in electronic storage.—A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.
>
> (b) Contents of wire or electronic communications in a remote computing service.—(1) A governmental entity may require a provider of remote computing

> service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable . . . (B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity— . . . (ii) obtains a court order for such disclosure. . . .

The Amended Complaint does not allege how long Mr. Mink's email communications had been stored in Yahoo's electronic storage system or whether Mr. Mink was provided notice of the court order.

Section 2707 provides a right of action against those who violate the ECPA "with a knowing or intentional state of mind. . . ." 18 U.S.C. § 2707(a). However, "A good faith reliance on... a court warrant or order . . . is a complete defense to any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2707(e).

Ms. Knox argues that, just as her actions fell outside the volitional element of the PPA, she did nothing to violate the ECPA. Here again, the Amended Complaint alleges only that Ms. Knox reviewed and approved the affidavit that provided the basis for the court order by which Yahoo was compelled to produce Mr. Mink's email communications. The Plaintiffs argue that but for Ms. Knox's approval of the affidavit, no disclosure would have taken place and her participation in the events leading up to the disclosure thus gives rise to liability.

Appendix B

The but-for test that the Plaintiffs contemplate would produce results that the Plaintiffs cannot intend. Taken literally, it would apply to the clerk who typed the order, the magistrate who approved it, and the notary public who sealed it. In short, it would encompass everyone but Ms. Knox; the police could more easily (and inadvisably) have obtained the court order without first going to Ms. Knox for approval. The but-for test is untenable.

Notably, the Plaintiffs do not cite any authority. Ms. Knox claims not to have found any case law on the question. The volitional prohibition of the ECPA—"require the disclosure"—is different from that of the PPA—"search for or seize"—and analogy to the latter is unhelpful.

For definitions of terms, Section 2711 of the ECPA refers the reader to Section 2510, which, unfortunately, leaves most of the volitional terms of the ECPA undefined. As several courts have noted, the statute is "famous (if not infamous) for its lack of clarity." *Steve Jackson Games, Inc. v. United States Secret Serv.*, 36 F.3d 457, 462 (5th Cir.1994). The only volitional term defined is "intercept," which "means the aural or other acquisition" of communications. 18 U.S.C. § 2510(4). One court, looking to that definition in its attempt to interpret the volitional element of Section 2701—"intentionally access" an electronic communication facility—noted that Section 2510(4) presents a further definitional problem; "acquisition," like "access," is left undefined by the act. *United States v. Moriarty*, 962 F.Supp. 217, 219

(D.Mass.1997). In that case, the court resolved the dilemma by looking to legislative history.

Section 2703 was part of the 1986 amendment to the pre-existing Omnibus Crime Control and Safe Streets Act of 1968 ("Wire Tap Act"), 18 U.S.C. 2510 *et seq.*, which circumscribed Government interception of wire and oral communications and applied, at the time, only "where the contents of a communication can be overheard and understood by the human ear." 1986 U.S.C. Congressional and Administrative News 3555, 3556. In order to bring the Wire Tap Act to bear upon "development of communications and computer technology," Congress passed the 1986 amendment, intending to extend coverage to modern "large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing." *Id.* Recognizing "that computers are used extensively today for the storage and processing of information," and particularly intending to protect information "subject to control by a third party computer operator," the Senate Judiciary Committee designed the ECPA to extend existing limits on Government and other third-party access of wire and mail communications "to stored wire and electronic communications and transactional records." 1986 U.S.C.C.A.N at 3557.

It is not too much to infer that the Government action prohibited by the ECPA is that prohibited by the Wire Tap Act, namely, acquisition of protected information. As the *Moriarty* court noted, the only difference between

"intercept," as that term is used in the Wire Tape Act, and "access," as that term is used in Section 2701 of the ECPA, is temporal; interception is acquisition simultaneous with transmission while access is acquisition of material already stored. *Moriarty*, 962 F.Supp. at 220. Likewise, "require the disclosure," the term at issue in Section 2703, is merely an extension of the Wire Tap Act's volitional element—acquisition—to modern technologies. The Senate Judiciary reported that "section 2703 provides requirements for the government to *obtain the contents* of" a stored electronic communication. 1986 U.S.C.C.A.N at 3592 (emphasis provided). The term "obtain the contents" is used several times in the report's discussion of Section 2703, along with the slightly varied, "access the contents." Both of these phrases discuss an activity in which Ms. Knox is not alleged to have engaged.

With this legislative history in mind, it is perhaps not surprising that decisions construing the volitional language of Section 2703 of the ECPA have invariably involved some active solicitation of the protected information by the defendant. *See Freedman v. Am. Online, Inc.*, 303 F.Supp.2d 121 (D.Conn.2004) (two police officers solicited from America Online, Inc. ("AOL") information stored electronically using a defective search warrant); *McVeigh v. Cohen*, 983 F.Supp. 215 (D.D.C.1998) (Navy officer solicited user identification from AOL); *United States v. Reyes*, 922 F.Supp. 818, 837 (S.D.N.Y.1996) (noting that Section 2703 applies to the accessing of stored information). The Plaintiffs have not offered any reason to depart from the common

understanding of the ECPA. To give the statute the application the Plaintiffs request would stretch the volitional element well beyond the usage intended by Congress.

This conclusion is also commended by the good-faith defense provision of the ECPA, 18 U.S.C. § 2707(e), which covers those who conduct a search in good-faith reliance upon a warrant or court order. As the Plaintiffs point out, applying that defense to Ms. Knox would produce a temporal problem—Ms. Knox could not have relied upon the court order before it was issued. The Plaintiffs, however, cannot have it both ways. If the good-faith reliance defense does not reach retrospectively, then it makes no sense to extend liability back in the first place. Put another way, Ms. Knox's actions must either fall within both the volitional and the defense provisions of the ECPA or come under neither. Congress could not have intended the result urged by the Plaintiffs and the language of the statute does not require it.

I conclude that the Plaintiffs have failed to state a claim and that their Fourth Claim must be dismissed.

III. Attorney General's Motion to Dismiss

The Plaintiffs allege in the Amended Complaint that no criminal charges are pending against them and that the District Attorney has assured that no charges will be filed. Nevertheless, they fear prosecution in the future because they intend to continue violating the Libel Statute. The Plaintiffs lack standing to preempt a

potential prosecution. The Tenth Circuit has held that "assurances from prosecutors that they do not intend to bring charges are sufficient to defeat standing, even when the individual plaintiff had actually been charged or directly threatened with prosecution for the same conduct in the past." *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir.2004), *citing Faustin v. City & County of Denver*, 268 F.3d 942, 948 (10th Cir.2001) and *PETA v. Rasmussen*, 298 F.3d 1198, 1203 (10th Cir.2002). The First Count is dismissed.

It is ORDERED that

1) Ms. Knox's Motion to Dismiss [21-1] is GRANTED;

2) the Attorney General's Motion to Dismiss [22-1] is GRANTED;

3) the Plaintiffs' Motion for Partial Summary Judgment [32-1] is DENIED;

4) the case is DISMISSED; and

5) the Defendants are awarded costs.

Dated: October 26, 2004, in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock
Lewis T. Babcock, Chief Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 19, 2007

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-1496
(D.C. No. 04-B-23 (CBS))

THOMAS MINK; THE HOWLING PIG, an unincorporated association,

Plaintiffs-Appellants,

v.

JOHN W. SUTHERS, in his official capacity as Attorney General of the State of Colorado, KENNETH R. BUCK, District Attorney for Colorado's 19th Judicial District; SUSAN KNOX, a Chief Deputy District Attorney working for Colorado's 19th Judicial District Attorney's Office, in her individual capacity,

Defendants-Appellees,

and

STUDENT PRESS LAW CENTER; SILHA CENTER FOR THE STUDY OF MEDIA ETHICS; WORLD PRESS FREEDOM COMMITTEE; ASSOCIATED PRESS; BLOOMBERG NEWS; COLORADO PRESS ASSOCIATION; DOW JONES & COMPANY, INC.; MEDIA LAW RESOURCE CENTER; THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; COLORADO DISTRICT ATTORNEYS' COUNCIL,

Amicus Curiae.

Appendix C

ORDER

Filed July 19, 2007

Before O'BRIEN, EBEL, and TYMKOVICH, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: [illegible]
Deputy Clerk

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(2)

No. 07-516

Supreme Court, U.S.
FILED
NOV 15 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

SUSAN KNOX, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Petitioner,

v.

THOMAS MINK; AND THE HOWLING PIG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE*, COLORADO DISTRICT ATTORNEY'S COUNCIL, IN SUPPORT OF PETITIONER

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BRIEF OF COLORADO DISTRICT ATTORNEY'S COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Paul R. Wolff, Chief Deputy District Attorney for the 18th Judicial District of the State of Colorado, on behalf of the Colorado District Attorney's Council ("CDAC") *Amicus Curiae*, respectfully files this brief in support of Chief Deputy District Attorney Susan Knox's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") entered in this case.[1] Mr. Andrew Ringel, Esq., counsel for Susan Knox, and Mr. Bruce Jones, Esq., counsel for Thomas Mink and the Howling Pig, have given written consent that they do not object to CDAC participating as *amicus curiae*. (*See* Appendices A and B) Previously, CDAC's motion to enter as *amicus* in the Tenth Circuit was also unopposed by these parties.

I. INTEREST OF *AMICUS CURIAE* CDAC

The Colorado District Attorneys Council (CDAC) is a separate legal entity of government that, *inter alia,* represents the interests of the district attorneys in the State of Colorado. The adverse ruling by the

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[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. Counsel for CDAC authored this brief in whole. No other entity or person made any monetary contribution to the preparation or submission of this brief.

Tenth Circuit against Chief Deputy District Attorney Knox affects all prosecutors in the state of Colorado as well as prosecutors in other states. The Tenth Circuit's ruling severely affects district attorneys for two main reasons.

First, district attorneys will be deterred from exercising independent judgment when they review search warrant affidavits at the direction of the court. Acting under the authority of a Colorado statute, C.R.S. § 20-1-106.1, some Colorado judges have *required* district attorneys to assist in the process of issuing search warrants by having the district attorney review such warrants and affidavits for legal sufficiency prior to the submission of those documents to the judge. If a district attorney enjoys only qualified immunity for assisting the court in performing this judicial function, the district attorney's ability to exercise independent judgment in the process will be infringed.

Second, district attorneys are greatly confused by the Tenth Circuit's opinion, because the guidance it gives prosecutors is precisely the opposite of the guidance which has emerged from previous decisions of the Supreme Court. The conflict between the Tenth Circuit's opinion and previous Supreme Court decisions creates extreme uncertainty over *how* district attorneys should participate in the process of issuing search warrants. This uncertainty will cause prosecutors to be preoccupied with defending vexatious civil litigation at the expense of focusing on their primary

responsibilities of prosecuting criminals and promoting community safety.

II. SUMMARY OF ARGUMENT

The Tenth Circuit's opinion conflicts with decisions of other federal courts and the U.S. Supreme Court regarding the type of immunity that protects a prosecutor who reviews search warrants for legal sufficiency. Some Colorado judges have exercised their statutory authority under C.R.S. § 20-1-106.1(1)(a) to *require* district attorneys to review search warrant applications for legal sufficiency before the applications are submitted to a magistrate. The district attorney's review is limited to assessing whether the police officer's affidavit establishes probable cause supporting issuance of the requested search warrant. Prosecutors should be entitled to absolute immunity for performing this review. The prosecutor does not conduct any investigation, does not render legal advice concerning the investigation, does not sign the affidavit supporting probable cause, and does not conduct the search if the warrant is authorized. A prosecutor's review of a search warrant for legal sufficiency, at the request of the court, cannot be said to be either "investigative" or "administrative." Instead, it is an advocate's function performed in conjunction with a judicial proceeding, and protected by absolute immunity under United States Supreme Court precedent.

This Court should grant the petition for certiorari and clarify that a prosecutor's review of a search warrant for legal sufficiency is entitled to absolute immunity.

III. ARGUMENT

The question in this case is whether a district attorney's review of a search warrant affidavit – conducted at the request of the court – is protected by absolute immunity in an action brought under 42 U.S.C. § 1983. Some background on Colorado practices may be helpful.

Colorado is geographically divided into twenty-two judicial districts. Each judicial district has an elected district attorney, and a number of appointed judges. By statute, Colorado's judges can *require* a district attorney to assist in the review of search warrant applications. C.R.S. § 20-1-106.1 provides, in relevant part:

> (1) The district attorneys of the several judicial districts *shall*: (a) Render, in their quasi-judicial capacity, legal advice to peace officers, upon the request of such officers *or of the court,* pertaining to the preparation and review of affidavits and warrants for arrests, searches, seizures, nontestimonial identification items, and court orders for the production of records. . . .

(Emphasis added.) Consistent with that statutory authority, the judges in Petitioner's judicial district

requested review of search warrant affidavits by the district attorney's office prior to their submission to a judge. *See* Petition for Writ of Certiorari, at 21. Because the judiciary had requested this assistance, Petitioner was statutorily mandated to review the search warrant affidavit in this case.

Not all of Colorado's judges utilize the procedure afforded by C.R.S. § 20-1-106.1. However, in a number of judicial districts, including Petitioner's, the judges have obligated the district attorneys to assist the court by reviewing search warrant affidavits for legal sufficiency. The judges presumably impose this requirement because they perceive it to be beneficial to the judicial process.

The procedure benefits the judiciary itself. If the district attorney determines that a search warrant affidavit does not establish probable cause, the affidavit likely will never be presented to a judge. This keeps judges from being inundated with search warrant applications that are wholly inadequate. When a search warrant is presented to a judge, the judge will perform an independent review, but can be assured that the district attorney has already conducted an identical review, prior to the papers being submitted to the court.

The procedure also benefits the judicial process as a whole. Judges are not infallible and, from time to time, issue a search warrant that is legally deficient. When Colorado judges require district attorneys to participate in the process of reviewing search warrant

applications, they in effect create a second hurdle over which the search warrant application must jump: both the district attorney and the judge must approve of the warrant. This provides additional protection for all citizens by better ensuring that only meritorious search warrants are issued.

In Colorado the manner of presenting a search warrant application to a judge varies by time and place. During business hours, the police officer who authored the search warrant affidavit typically will present the affidavit to the judge in the judge's chambers. Some Colorado judges require a district attorney to physically accompany the police officer when this occurs, as reassurance that the district attorney has conducted the required review. After business hours, the review of search warrant applications can be coordinated with phone calls between a duty judge, a duty district attorney, and a police officer. In the evening the police officer sometimes takes the documents to the duty judge's home, or, if the judge prefers, may send the documents by fax or email. Despite the variety of ways in which search warrant applications are submitted to the reviewing judge, Colorado does *not* have a procedure for presenting evidence in court to establish probable cause for a search warrant. In Colorado, probable cause to search must be established within the "four corners" of the search warrant affidavit.

Based on Supreme Court precedent, Petitioner's involvement in this search warrant review process should be afforded absolute immunity.

Absolute immunity for government officials in a 42 U.S.C. § 1983 action arises from historical and policy considerations. *Imbler v. Pachtman,* 424 U.S. 409, 417-30 (1976). For prosecutors, absolute immunity exists for conduct "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Thus, in initiating a prosecution and presenting the State's case, a prosecutor has absolute immunity from a civil suit for damages under § 1983. *Id.* at 431. Likewise, a prosecutor enjoys absolute immunity for appearing in court to support a search warrant application and for presenting evidence at the hearing. *Burns v. Reed*, 500 U.S. 478, 492 (1991). A prosecutor's preparation and filing of an information and motion for arrest warrant also are protected by absolute immunity. *Kalina v. Fletcher,* 522 U.S. 118, 129 (1997).

By contrast, the Supreme Court has been reluctant to find absolute immunity where a prosecutor's conduct is not "intimately associated with the judicial phase of the criminal process." Absolute immunity does not extend to a prosecutor who advises police they have probable cause to make a *warrantless* arrest. *Burns*, 500 U.S. at 481-96. Likewise, a prosecutor is not absolutely immune for authorizing a *warrantless* wiretap. *Mitchell v. Forsyth,* 472 U.S. 511, 520-23 (1985). A prosecutor's involvement in gathering evidence during the early stages of an investigation – long before any form of judicial proceedings have commenced – is not protected by absolute immunity. *Buckley v. Fitzsimmons,* 509 U.S. 259,

275 (1993). Finally, a prosecutor who executes a certification of probable cause is functioning as a witness and is not entitled to absolute immunity for that conduct. *Kalina v. Fletcher,* 522 U.S. 118, 129-31 (1997). A prosecutor who functions purely as an "administrator" or investigator, "rather than as an officer of the court," is entitled only to qualified immunity. *Imbler,* 424 U.S. at 431 n.33; *Buckley,* 509 U.S. at 273-74.

Here, Petitioner functioned as an officer of the court. She reviewed the search warrant application at the request of the judiciary, and her review was identical to that which shortly thereafter was performed by the judge – an assessment of whether the affidavit established probable cause. This review process constituted a judicial proceeding. "[T]he issuance of a search warrant is unquestionably a judicial act." *Burns*, 500 U.S. at 492 (*citing Stump v. Sparkman,* 435 U.S. 349, 363 n.12 (1978)). If Petitioner's review had occurred in conjunction with a courtroom hearing for issuance of a search warrant, that review would unquestionably be protected by absolute immunity. *See Burns,* 500 U.S. at 492. Colorado, however, does not have a procedure for holding such a hearing; probable cause for issuance of a search warrant is established exclusively by affidavit, typically examined outside the courtroom.

The absence of a courtroom setting should not strip a Colorado prosecutor from the absolute immunity that protected the prosecutor in *Burns*. The duties of the prosecutor in his role as advocate for the

State include actions "apart from the courtroom" that are nonetheless entitled to absolute immunity. *Imbler,* 424 U.S. at 431 n.33; *Buckley,* 509 U.S. at 272. Informality does not alter the nature of proceedings that are, in their function, part of the judicial process. *See Stump,* 435 U.S. at 363 (petition for involuntary sterilization of minor was not given a docket number and was not filed with the clerk; judge approved petition *ex parte,* without notice or hearing, outside the courtroom, and while not in his judge's robes; Supreme Court found "no merit to [the] argument that the informality with which he proceeded rendered his action non-judicial and deprived him of his absolute immunity").

The fact that the search warrant issued without a criminal case having been filed also should not alter the analysis. A prosecutor's duties as advocate for the State "involve actions preliminary to the initiation of a prosecution" but which still are protected by absolute immunity. *Imbler,* 424 U.S. at 431 n.33; *Buckley,* 509 U.S. at 272. In *Burns*, the Court stated without qualification that a prosecutor's appearance at a search warrant hearing was "intimately associated with the judicial phase of the criminal process," and moreover was "connected with the initiation and conduct of a prosecution" – "particularly" where the hearing occurs after an arrest, but not exclusively so. *Burns,* 500 U.S. at 492. For conduct before the filing of a criminal case, absolute immunity protects the prosecutor's role "because any lesser degree of immunity could impair the judicial process itself." *Malley v.*

Briggs, 475 U.S. 335, 342-43 (1986). "Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability." *Id.*

Petitioner was engaged in the same review process as the judge: assessing whether the search warrant affidavit established probable cause. The only difference was that, after the search warrant application passed muster with the district attorney and was submitted to the judge, the judge could actually sign and issue the warrant. The fact that Petitioner's review was identical to that of the judge supports a grant of absolute immunity for her actions. In determining immunity, a court examines "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White,* 484 U.S. 219, 229 (1988).

A state, of course, cannot limit immunity under federal law, *Howlett v. Rose,* 496 U.S. 356 (1990), but it can define the actions of its officers. The Supreme Court has resolved questions of immunity by referring to the statute which defines the function in question. *See Butz v. Economou,* 438 U.S. 478 (1978) (executive branch officials who initiate and participate in adjudicatory functions before administrative agencies have absolute immunity); *Cleavinger v. Saxner,* 474 U.S. 193 (1985) (prison disciplinary committee members not entitled to absolute immunity).

C.R.S. § 20-1-106.1 defines the function of the district attorney in reviewing search warrant applications. The statute uses the term "quasi-judicial capacity" to describe the district attorney's role. Significantly, the statute does not require the district attorney to give legal advice to the police concerning their investigation; instead the district attorney's legal assessment pertains to "the preparation and review of affidavits and warrants for arrests, searches, seizures, nontestimonial identification items, and court orders for the production of records." In this regard the Colorado prosecutor's conduct is distinguishable from that addressed in *Burns*, which involved legal advice to police officers about interrogation techniques and whether there was probable cause for a *warrantless* arrest.

Under Colorado law, the prosecutor does not present the search warrant affidavit to the court, nor swear to the facts – police officers do that. *See* C.R.S. §§ 16-3-303, 16-3-305. Colorado's procedure is therefore different from the practice addressed in *Kalina*, under which prosecutors from the state of Washington functioned as witnesses by signing a certification of probable cause.

In *Kalina*, the Court emphasized that the Washington prosecutor's decision to function as a witness was not required by either state or federal law, and contrary to tradition and ethical considerations which instruct counsel to avoid participating as both advocate and witness in the same proceeding. 522 U.S. at

129-30. This emphasis implies that where a prosecutor performs a function required by law, and not inconsistent with tradition, the function is more likely to be one which is accorded absolute immunity. Colorado prosecutors are legally required to review all search warrant applications, upon request of the court, and are legally required to review all "no knock" search warrants regardless of whether any request has been made. *See* C.R.S. § 20-1-106.1(1)(a); *cf.* § 20-1-106.1(1)(b).

The Supreme Court has recognized that protecting officials with absolute immunity is, in effect, a balancing of evils. *Imbler,* 424 U.S. at 428. With absolute immunity, officials are able to exercise independent judgment in their duties, without the fear or distraction of lawsuits, but citizens lose the ability to challenge the official's conduct by seeking civil relief. *Id.* However, it is noteworthy that in the context of a prosecutor's review of search warrant applications, there already exists a significant check on the exercise of the prosecutor's judgment: the warrant will not issue unless a magistrate, exercising independent, impartial judgment, agrees with the prosecutor's assessment that the affidavit is legally sufficient. No citizen will ever be aggrieved by a district attorney's review of a search warrant application if the search warrant is not issued by the court.

The Tenth Circuit's opinion in this case makes two statements that are contrary to established Supreme Court precedent, and are completely confusing to criminal prosecutors. First, the Tenth Circuit

stressed that the prosecutor "played no role in preparing the affidavit" and expressed the view that, if she had taken such a role, "this would be quite a different case." *See* Petition for Writ of Certiorari, at 35a. But active involvement in preparing the affidavit for probable cause would have placed the prosecutor squarely in the role of a police officer – crafting the version of events to which the officer would attest – and thus within the investigative realm of police work for which qualified immunity applies. Based on *Imbler* and other Supreme Court precedent, prosecutors have been careful to restrict their involvement in the preparation of search warrants, avoiding any drafting of language, since attesting to facts is a police officer's function that is not protected by absolute immunity. The Tenth Circuit's opinion suggests that, to enjoy absolute immunity, prosecutors should do just the opposite, actively involving themselves with drafting the policeman's affidavit.

Second, the Tenth Circuit distinguished *Burns* and *Kalina* on the ground that Petitioner's function was to "provide legal advice outside the courtroom to aid a nascent investigation." Petition for Writ of Certiorari, at 36a. Yet the Supreme Court has made clear that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Imbler*, 424 U.S. at 431 n.33. A judge does not lose absolute immunity for review of a search warrant merely because a criminal case has yet to be filed. A prosecutor who performs the same

function of reviewing a search warrant for legal sufficiency – at the court's request – likewise should have absolute immunity, regardless of whether a case has been or ever is instituted.

Where a judge knows that a district attorney has reviewed a search warrant application, the district attorney's review in effect constitutes a statement to the judge: "*Your honor, the prosecution maintains that the affidavit before you establishes probable cause for issuance of the accompanying search warrant.*" This representation to the court may occur through more informal words or acts, and may occur outside a courtroom setting, but the representation nonetheless is made. From this perspective, a district attorney's compliance with a judicially imposed requirement to review search warrant applications falls squarely in the prosecutor's traditional role as advocate and officer of the court. Absolute immunity should protect such conduct. *Imbler,* 424 U.S. at 430-31 & n.33; *Burns,* 500 U.S. at 491.

The Court need not, in this case, address the broader question of whether a district attorney's review of a search warrant application is always protected by absolute immunity. Of course, the Court could choose to address that broader question in the context of Petitioner's conduct. But this case could appropriately be decided on the more limited question of whether a district attorney enjoys absolute immunity when reviewing a search warrant application at the request of the court. The petition for certiorari should be granted to clarify that – at least when such

a review is conducted in response to a judicial request – the district attorney enjoys the same degree of immunity as the judge.

IV. CONCLUSION

This Court should grant Chief Deputy District Attorney Susan Knox's petition for a writ of certiorari.

Respectfully submitted,

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No. 07-516

In The Supreme Court of the United States

SUSAN KNOX, a Chief Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Petitioner,

v.

THOMAS MINK; THE HOWLING PIG,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Tenth Circuit correctly apply well-settled Supreme Court authority when it held that a prosecutor is not entitled to absolute immunity for her role in advising a police officer on the form and content of a draft search warrant and supporting affidavit, where the advice was limited to the earliest stage of the police department's criminal investigation, no criminal charges had been filed or were close to being filed, there was no pending judicial proceeding, and no charges were ever filed?

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STATEMENT OF THE CASE

The Statement of the Case in the Petition is incomplete. It quotes at length from the district court decision in Knox's favor on the absolute immunity question, but fails to include any of the Tenth Circuit's extensive analysis of that issue. Respondent provides the Tenth Circuit's analysis in the argument section of this brief, *infra* at 3-9.

Knox also omits key facts related to her role in the approval of the search warrant and affidavit, as well as the overall role of the district attorney's office in instigating the investigation. The Amicus also misstates those facts and presents other facts that have no support in or outside the record in this case.

Specifically, Knox states that Professor Peake (whose complaint led to the search and other acts that led to this lawsuit) complained to the Greeley, Colorado Police Department, which initiated an investigation of Mr. Mink. Pet. at 5. To the contrary, Professor Peake first complained directly to the district attorney's office, which assigned an investigator to the matter. The district attorney's investigator compiled a packet of information that he turned over to the police department with a request that the department contact the professor. A detective did so, which resulted in the preparation of the affidavit and search warrant that Knox then reviewed. 10th Cir. App. 81.

The Amicus' assertions that Knox reviewed the application "at the request of the judiciary," and that

"her review was identical to that which shortly thereafter was performed by the judge," Amicus Br. at 8, has no support in the record. *See infra* at 11-12. Likewise, nothing in the record establishes the accuracy of the Amicus' description of the manner in which search warrant applications are presented to judges in Colorado. *See* Amicus Br. at 5-6.

REASONS FOR DENYING THE PETITION

The doctrine of absolute prosecutorial immunity is well-established and this Court's existing decisions are adequate to guide lower federal courts, as they fully guided the Tenth Circuit in this case. Under the functional analysis mandated by the Court's decisions, and faithfully applied by the Tenth Circuit, Knox's conduct in reviewing a police officer's search warrant and affidavit falls far on the "investigative/administrative" side of the line between a district attorney's "investigative/administrative" and "advocacy" functions. Even if there were room for disagreement as to the court of appeals' conclusion, the petition asserts at worst "the misapplication of a properly stated rule of law[,]" Sup. Ct. R. 10, which does not justify granting certiorari review.

Moreover, to reach the issue presented by Knox, the Court would need to interpret a Colorado statute – C.R.S. § 20-1-106.1 – in a manner contrary to its specific language. The Court would then be required to apply the statute based on an unclear factual

record. Given the non-federal nature of the issue, and the limited application of any such ruling, certiorari review is unwarranted.

I. The Tenth Circuit Correctly Applied Well-Settled Precedent.

In addressing Knox's absolute immunity claim, the Tenth Circuit carefully reviewed and applied "the modern doctrine of prosecutorial immunity in § 1983 cases. . . ." Pet. App. 27a. The court of appeals traced the development of that body of law beginning with the Court's seminal decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and continuing through *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); and *Kalina v. Fletcher*, 522 U.S. 118 (1997). Pet. App. 27a-32a. Knox acknowledges that those four cases establish the appropriate "functional approach for making absolute immunity decisions." Pet. 10. Her argument is that the Tenth Circuit failed to adhere to those decisions. Pet. at 10 ("The Court of Appeals' decision fails to follow decisions from the [Supreme] Court in two respects."); *id.* at 11 ("Both the Court of Appeals' analysis and its holding are in conflict with prior decisions of this Court. . . ."). She does not suggest a vacuum in the law or a split in decisions among circuits that might warrant this Court's intervention.

In fact, the Tenth Circuit did follow *Imbler*, *Burns*, *Buckley*, and *Kalina*. After a detailed exposition of the analysis in each of those decisions as well

as relevant Tenth Circuit prosecutorial immunity cases applying the Supreme Court authority, Pet. App. 27a-34a, the court of appeals accurately summarized the law of prosecutorial immunity as follows:

> As the above cases demonstrate, there is no bright line between advocacy and investigation. It is clear that a prosecutor's courtroom conduct falls on the advocacy side of the line. *Buckley*, 509 U.S. at 274, 113 S.Ct. 2606. And it is equally clear that advocacy is not limited to filing criminal charges or arguing in the courtroom. *Id.* at 272, 113 S.Ct. 2606. Thus, especially when considering pre-indictment acts, it is important to consider other factors, such as (1) whether the action is closely associated with the judicial process, *Burns*, 500 U.S. at 495, 111 S.Ct. 1934, (2) whether it is a uniquely prosecutorial function, *id.* at 491 n.7, 111 S.Ct. 1934, and (3) whether it requires the exercise of independent professional judgment, *Kalina*, 522 U.S. at 130, 118 S.Ct. 502.
>
> In sum, a prosecutor is entitled to absolute immunity for those actions that cast him in the role of an advocate initiating and presenting the government's case. Absolute immunity, however, does not extend to those actions that are investigative or administrative in nature, including the provision of legal advice outside the setting of a prosecution. *See Imbler*, 424 U.S. at 430-31, 96 S.Ct. 984; *Burns*, 500 U.S. at 486, 493-94, 111 S.Ct. 1934.

Pet. App. 33a-34a. The court of appeals never remotely intimated that this Court's existing decisions provide insufficient guidance to resolve the immunity issue in this case.

The Tenth Circuit began its application of the controlling precedent with the observation that "the district attorney does not contend she acted as an advocate 'intimately involved' in a judicial proceeding." Pet. App. 34a. "Rather, she alleges her role was limited to review and approval of the search warrant application; she does not even contend she evaluated whether probable cause existed to arrest or press charges." *Id.* The panel further emphasized that when Knox reviewed the affidavit, (a) "police had only the allegations of Professor Peake and had not yet confirmed the authorship of the articles contained in *The Howling Pig*"; (b) "the search of Mink's residence was part of a continuing effort to obtain evidence"; (c) "the attorney's review was, at most, legal advice as to the sufficiency of the affidavit"; and (d) perhaps most important "the district attorney was far from filing charges . . . and subsequent events show that the office came to believe the case could not be prosecuted." *Id.* at 34a-35a.

The Tenth Circuit then concluded that Knox's "review of the affidavit cannot be said to be a uniquely prosecutorial role." *Id.* at 35a. The court of appeals reasoned:

> While it is laudable that a legal review occur before the police proceed to a magistrate for

> a warrant, the Supreme Court made it clear in *Burns* that a legal review for the sufficiency of evidence to support probable cause is not sufficient to confer absolute immunity. Absolute immunity applies to the "prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Burns*, 500 U.S. at 494, 111 S.Ct. 1934. And while it may at times be difficult to discern the line between "investigation" and "advocacy," here we do not even have a case where the prosecutor was preparing for her "role as advocate for the State." *Buckley*, 509 U.S. at 271, 113 S.Ct. 2606. No one suggests the district attorney was preparing for a judicial proceeding in merely reviewing the affidavit.

Id.

The Tenth Circuit then acknowledged that "the review of the affidavit can be said to require the exercise of professional judgment," but it observed that "that is true every time a prosecutor provides legal advice." *Id.* Following "the Supreme Court's functional approach," the court of appeals correctly "look[ed] to which role the prosecutor is performing – advocate or investigator." *Id.* at 35a-36a. It concluded: "Here, the review of the affidavit squarely falls on the side of investigatory legal advice, and not advocacy before a judicial body. The deputy district attorney played no role in preparing the affidavit, nor was she involved in preparing, analyzing, and presenting pleadings to a court." *Id.* at 36a.

The Tenth Circuit distinguished this case from "those cases where prosecutors have been absolutely immunized for drafting, filing, and arguing in support of an arrest or search warrant," because in those cases, "the prosecutor was acting as an advocate – evaluating evidence, preparing pleadings, and appearing in court." *Id.* (citations omitted). In the instant case, by contrast, "the prosecutor's function was not that of an advocate; her function was to provide legal advice outside the courtroom to aid a nascent investigation." *Id.* Ultimately, the Tenth Circuit concluded, because "the prosecutor was not preparing her case[,]" absolute immunity "does not attach." *Id.*

Knox suggests that the Tenth Circuit somehow strayed from this Court's "functional approach" to prosecutorial immunity, *see* Pet. at 10, 16-19, 21-22, but the court of appeals actually did just the opposite. The panel took a hard look at precisely "what the attorney did," Pet. App. 37a, which is the essence of a functional analysis. It held against absolute immunity based on the following acts that Knox either did or did not undertake:

- She was not "'intimately involved' in a judicial proceeding[,]" *id.* at 34a;
- "[H]er role was limited to review and approval of the search warrant application[,]" *id.*;
- She did not "evaluate[ ] whether probable cause existed to arrest or press charges[,]" *id.*;

- She "was far from filing charges at the time of the search," *id.* at 35a;
- She was not "preparing for a judicial proceeding[,]" *id.*;
- She "played no role in preparing the affidavit, nor was she involved in preparing, analyzing, and presenting pleadings to a court[,]" *id.* at 36a;
- "[H]er function was to provide legal advice outside the courtroom to aid a nascent investigation[,]" *id.*; and
- She "was not preparing her case[,]" *id.*

On these facts, as alleged in the First Amended Complaint and established in Knox's affidavit in support of her motion to dismiss, the Tenth Circuit faced no shortage of directly on-point Supreme Court authority. *First*, in *Imbler*, the Court held that a prosecutor is absolutely immune only for those activities "intimately associated with the judicial phase of the criminal process," 424 U.S. at 430-31, yet here it was undisputed that no judicial proceedings had commenced, since the police department was in the early stage of its investigation. *Second*, in *Burns*, the Court squarely rejected absolute immunity for prosecutors' conduct in giving legal advice to the police during a pretrial factual investigation – which is all that was occurring here: "We do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process' . . . that it

qualifies for absolute immunity." 500 U.S. at 493 (quoting *Imbler*, 424 U.S. at 430). *Third*, the Court has repeatedly confirmed this holding in *Burns*. *See Kalina*, 522 U.S. at 126 ("[The] provision of legal advice to the police during their pretrial investigation of the facts [is] protected only by qualified, rather than absolute, immunity."); *Buckley*, 509 U.S. at 271 ("[P]rosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police.").

In short, the opinion of the Tenth Circuit is straightforward, try as Knox might to make it complicated. It properly applies well-settled law. Even if this Court questions the court of appeals' ultimate conclusion, the case does not warrant certiorari review because the Tenth Circuit properly stated the controlling rule of law on prosecutorial immunity but, at worst, misapplied that law. Sup. Ct. R. 10.

II. The Petition Does Not Otherwise Present An Issue Deserving This Court's Review.

Certiorari also should be denied because this case centers on the interpretation of a state statute under disputed facts. Knox and her Amicus assert that she was reviewing the search warrant application and affidavit at the request of a Colorado state court, pursuant to a Colorado statute, C.R.S. § 20-1-106.1. Knox ignores inconvenient language in the statute contradicting her argument, which states that district attorneys are to render "legal advice to peace officers" in this review process. Thus, under the plain language of the

statute, district attorneys are functioning in their role as legal advisors to the *police*, and are neither primarily providing legal assurances to a *court* nor acting as advocates. Indeed, Knox's argument turns the statute on its head by suggesting that its purpose is to provide legal support or assistance to a magistrate, who presumably knows the law of probable cause, rather than to a police officer who needs assistance in assuring that the search warrant and affidavit are legally valid before presenting them to the magistrate. Since the interpretation of a single state statute is at the heart of Knox's argument – and since that interpretation is at least one step removed from the federal issue of absolute immunity for district attorneys from Section 1983 claims – this is not a case worthy of a grant of certiorari.[1]

It is also significant that, despite its "quasi-judicial" language, the Colorado statute does not provide absolute immunity to prosecutors, but allows for an action if a prosecutor performs his or her duties in bad faith. C.R.S. § 20-1-106.1(2). *See Kalina,* 522

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[1] Knox further misstates the terms of the Colorado statute in her statement of the Question Presented, when she says that she was "review[ing] . . . a search warrant for sufficiency of probable cause pursuant to a specific state statute *requiring her to do so* before the search warrant's presentation to a judge by the police. . . ." Pet. at *i*. The statute does not require the district attorney to review all search warrants before they may be presented to a court. Nor does it specifically require review for sufficiency of probable cause – as opposed to, for example, form and compliance with procedural requirements.

U.S. at 132 (Scalia, J., concurring) (when Section 1983 was enacted, public officials could assert "quasi-judicial immunity," which "was more akin to what we now call qualified, rather than absolute, immunity"). If Colorado has not chosen to proclaim absolute immunity for its prosecutors acting under Section 20-1-106.1(2), there is no reason for this Court to intervene to do so.

Additionally, the disputed factual record in this case will preclude the Court from cleanly interpreting the Colorado statute as applied to Knox's conduct. The linchpin of Knox's argument is that she was acting at the behest of a court. Pet. at 17. The Amicus makes a similar assertion without citing any record support. Amicus Br. at 8. In fact, the record does not establish that any judge actually asked Knox to review the affidavit and warrant in this case – nor that any judge has done so in any other case. In her affidavit filed in the trial court, Knox stated as follows:

> As part of our prosecutorial duties, I and the other attorney members of the District Attorney's Office are periodically contacted by peace officers from the various law enforcement entities in the Nineteenth Judicial District for the purpose of reviewing affidavits and warrants for arrest and search to review their legal sufficiency and support for probable cause. *It is my understanding* that the county and district judges in the Nineteenth Judicial District who are requested by peace officers to sign these warrants *either assume*

> *or specifically ask* for verification that the affidavit and warrant in question have been reviewed by a member of our District Attorney's Office.

Resp. App. 1-2 (emphasis added). As revealed by this quote, Knox and the Amicus have taken Knox's "understanding" concerning what judges "assume," and stated both as undisputed facts. In truth, the record does not establish that the magistrate either requested or expected that Knox would review the affidavit and warrant.

Nor is it clear that the police officer in question presented the search warrant materials to Knox for this reason. Although Knox states that the criminal complaint in this matter was made to the Greeley Police Department, Pet. at 5, the complainant, Professor Peake, first approached the district attorney's office directly. It appears that the district attorney referred him to the police department, with a request that the matter be investigated. 10th Cir. App. 81. Thus, it is certainly plausible that the officer presented the search warrant materials to an assistant district attorney because the matter had originated with the district attorney's office, and not because a judge required him to do so.

While Knox argues that the Tenth Circuit decision "will lead to significant disruption for prosecutors throughout the United States," Pet. at 22, this case actually centers on a particular statutory provision of a single state (as one assistant district attorney

"understood" that some state judges "assumed" the statute applied) and on a less than clear factual record. Any potential prosecutorial confusion – beyond being remote – would be limited to how things are done in a single judicial district in Colorado. Therefore, given the limited application of the Tenth Circuit's ruling, it is not an appropriate candidate for review by this Court.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 04 B 0023 (CBS)

THOMAS MINK and
THE HOWLING PIG, an unincorporated association,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity
as Attorney General of the State of Colorado;
A.M. DOMINGUEZ, JR., District Attorney for the
19th Judicial District, in his official capacity, and
SUSAN KNOX, a Deputy District Attorney
working for the 19th Judicial District
Attorney's Office, in her individual capacity,

Defendants.

AFFIDAVIT OF SUSAN KNOX

The undersigned being duly sworn deposes and states the following facts are true and based upon her personal knowledge.

1. I am a Chief Deputy District Attorney for the Nineteenth Judicial District and have served as a Deputy District Attorney for approximately the past six and one half years. As part of our prosecutorial duties, I and the other attorney members of the District Attorney's Office are periodically contacted by peace officers from the various law enforcement entities in the Nineteenth Judicial District for the

purpose of reviewing affidavits and warrants for arrest and search to review their legal sufficiency and support for probable cause. It is my understanding that the county and district judges in the Nineteenth Judicial District who are requested by peace officers to sign these warrants either assume or specifically ask for verification that the affidavit and warrant in question have been reviewed by a member of our District Attorney's office.

2. Sometime in mid-December of 2003, I was working in our office when Detective Warren of the Greeley Police Department came to our office with the affidavits and search warrants which are the subject of this lawsuit. His purpose was that outlined in the above paragraph. Since I was available for this purpose, Detective Warren came to me. I reviewed the affidavits and warrants in question and found their form to be appropriate for submission to a judge of our judicial district. I was not involved in any way in the investigation which had been conducted by Detective Warren and had no personal knowledge of the facts contained in the affidavit or affidavits in question. I have known Detective Warren for some time and believe him to be a very able and qualified peace officer. There was no reason of any type to question the facts contained in these affidavits.

3. I do not believe the affidavit or affidavits in question referred to any specific Colorado crime by statutory reference number and I have never before been involved in any prosecution for criminal libel.

4. A criminal investigation, in my belief, involves gathering facts and evidence which could potentially be presented to a District Attorney's Office for analysis and filing of criminal charges, if appropriate. In Colorado, a felony cannot be filed by a peace officer, but only by a District Attorney. The task which I performed in this particular situation is one I have done a number of times and is, by its very nature, something which the judges of our district want to be done by a prosecutor and not a peace officer.

5. The above facts constitute my only personal involvement in this matter.

FURTHER, THE AFFIANT SAYETH NAUGHT.

/s/ Susan Knox
SUSAN KNOX

STATE OF COLORADO)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this 8th day of March, 2004, by Susan Knox.

Witness my hand and seal.

/s/ Veronica R. Elkins
Notary Public